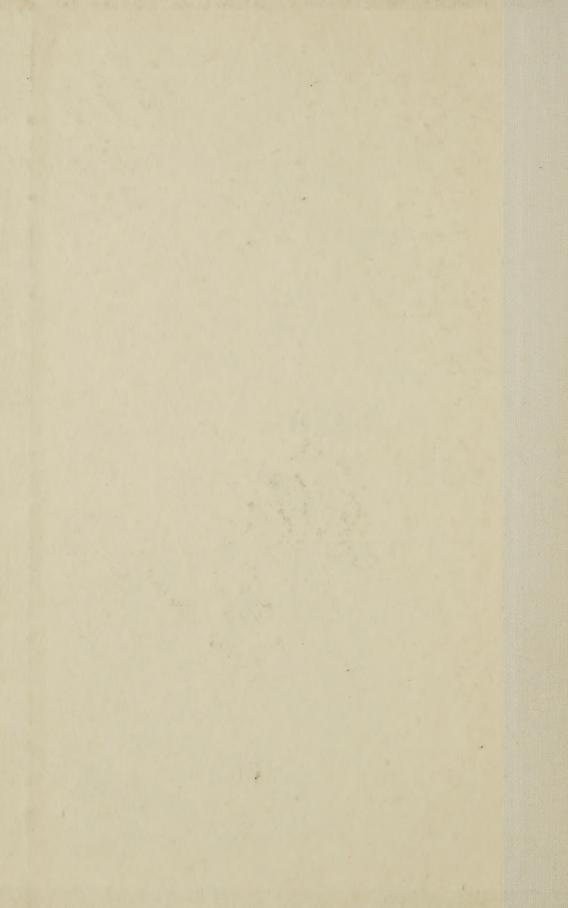
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THE GENERAL STATUTES OF NORTH CAROLINA

Containing General Laws of North Carolina through the Legislative Session of 1949

PREPARED UNDER THE SUPERVISION OF THE DEPARTMENT OF JUSTICE OF THE STATE OF NORTH CAROLINA

Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

Under the Direction of

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AND BEIRNE STEDMAN

Volume 2C

THE MICHIE COMPANY, LAW PUBLISHERS CHARLOTTESVILLE, VA. 1950

N. C. State Board of Health

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Scope of Volume

Statutes:

Full text of Chapters 83 through 105 of the General Statutes of North Carolina, including all enactments through the Legislative Session of 1949 here-tofore contained in Volume 2 of the General Statutes of North Carolina and the 1949 Cumulative Supplement thereto.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports volumes 1-230 (p. 576). Federal Reporter volumes 1-300. Federal Reporter 2nd Series volumes 1-174. Federal Supplement volumes 1-83. United States Reports volumes 1-337. Supreme Court Reporter volumes 1-69. North Carolina Law Review volumes 1-27.

Abbreviations

(The abbreviations below are those found in the General Statutes which refer
to prior codes.)
P. R Potter's Revisal (1821, 1827)
R S Revised Statutes (1837)
R. C. Revised Code (1854)
C. C. P Code of Civil Procedure (1868)
Code Code (1883)
Rev Revisal of 1905
C. S Consolidated Statutes (1919, 1924)

Scope of Volume

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Abbreviations

Preface

Volume 2 of the General Statutes of North Carolina of 1943 has been replaced by recompiled volumes 2A, 2B and 2C. These new volumes contain Chapters 28 through 105 of the General Statutes, as amended and supplemented by the enactments of the General Assembly down through the 1949 Session. Chapters 28 through 52 appear in volume 2A, Chapters 53 through 82 in volume 2B, and Chapters 83 through 105 in volume 2C.

Both the statutes and the annotations in the recompiled volumes are in larger type and in more convenient form than in the original volume. The annotations in the new volumes comprise those which appeared in original volume 2 and the 1949 Cumulative Supplement thereto; however, they have been considerably revised, and it is believed that the present annotations are an improvement over the old.

The historical references appearing at the end of each section have been rearranged in chronological order. For instance, the historical references appended to § 31-5 read as follows: (1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62; R. C., c. 119, s. 22; Code, s. 2176; Rev., s. 3115; C. S., s. 4133; 1945, c. 140.) In this connection attention should be called to a peculiarity in the manner of citing the early acts in the historical references. The acts through the year 1825 are cited, not by the chapter numbers of the session laws of the particular years, but by the chapter numbers assigned to them in Potter's Revisal (published in 1821 and containing the acts from 1715 through 1820) or in Potter's Revisal continued (published in 1827 and containing the acts from 1821 through 1825). Thus, in the illustration set out above the citations "1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2" refer to the chapter numbers in Potter's Revisal and not to the chapter numbers of the Laws of 1784 and 1819, respectively. The chapter numbers in Potter's Revisal and Potter's Revisal continued run consecutively, and hence do not correspond, at least after 1715, to the chapter numbers in the session laws of the particular years. After 1825 the chapter numbers in the session laws are used.

The recompiled volumes have been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

HARRY McMullan, Attorney General.

November 30, 1950.



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Architects.

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§ 83-1. "Practice of architecture" and "architect" defined.—For the purpose of this chapter, the practice of architecture consists of rendering or offering to render for compensation design and/or related supervision services, of an aesthetic and/or structural nature, for the construction of buildings, structures or projects, wherein the safeguarding of life, health, and property and the promotion of the public welfare may be involved. An architect is a person who practices architecture as herein defined; provided that nothing herein shall prevent a building contractor from drafting designs and plans without compensation for use by him in constructing or repairing buildings for the owner. (1915, c. 270, s. 9; C. S., s. 4985; 1941, c. 369, s. 3.)

Editor's Note.— The 1941 amendment rewrote this section. For comment on the amendment, see 19 N. C. Law Rev. 446.

- § 83-2. State Board of Architectural Examination and Registration; creation; membership; vacancies.—There shall be a State Board of Architectural Examination and Registration, consisting of five members, to be appointed by the Governor in the following manner, to wit: Within thirty days after the ninth day of March, one thousand nine hundred and fifteen, the Governor shall appoint five persons who are reputable architects residing in the State of North Carolina, who have been engaged in the practice of architecture at least ten years. The five persons so appointed by the Governor shall constitute the Board of Architectural Examination and Registration, and they shall be appointed for one, two, three, four, and five years, respectively. Thereafter, in each year, the Governor in like manner shall appoint one licensed architect to fill the vacancy caused by the expiration of the term of office, the term of such new members to be for five years. If vacancy shall occur in the Board for any cause, the same shall be filled by the appointment of the Governor. (1915, c. 270, s. 1; C. S., s. 4986.)
- § 83-3. Oath of members.—Each member of the State Board of Architectural Examination and Registration shall, before entering upon the discharge of the duties of his office, take and file with the Secretary of State an oath in writing to properly perform the duties of his office as a member of said Board, and to uphold the Constitution of North Carolina and the Constitution of the United States. (1915, c. 270, s. 2; C. S., s. 4987.)
- § 83-4. Organization of Board; officers; treasurer's bond.—The said Board shall, within thirty days after its appointment by the Governor, meet

- in the city of Raleigh, at a time and place to be designated by the Governor, and organize by electing a president, vice-president, secretary, and treasurer, each to serve for one year. Said Board shall have power to make such bylaws, rules, and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The treasurer shall give bond in such sum as the Board shall determine, with such security as shall be approved by the Board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. (1915, c. 270, s. 1; C. S., s. 4988.)
- § 83-5. Seal of Board.—The Board shall adopt a seal for its own use. The seal shall have the words "Board of Architectural Examination and Registration, State of North Carolina," and the secretary shall have charge, care, and custody thereof. (1915, c. 270, s. 5; C. S., s. 4989.)
- § 83-6. Meeting of Board; quorum. The Board shall meet once a year in July of each succeeding year, for the purpose of electing officers and transacting such other business as may properly come before it. Due notice of such annual meeting, and the time and place thereof, shall be given to each member by letter, sent to his last post-office address at least ten days before the meetings, and thirty days' notice of such annual meeting shall be given in some newspaper published in the city of Raleigh, at least once a week for four weeks preceding such meeting. Three members of the Board shall constitute a quorum. (1915, c. 270, s. 1; C. S., s. 4990.)
- § 83-7. Record of proceedings and of registration.—The secretary shall keep a record of the proceedings of the Board and registration for all applicants for registration and admission to practice architecture, giving the name and location of the institution or place of training where the applicant was prepared for the practice of architecture, and such other information as the Board may deem proper and useful. This registration shall be prima facie evidence of all matters recorded therein. (1915, c. 270, s. 1; C. S., s. 4991.)
- § 83-8. Examination and certificate of applicant.—Any person hereafter desiring to be registered and admitted to the practice of architecture in the State shall make a written application for examination to the Board of Architectural Examination and Registration, on a form prescribed by the Board, giving his name, age (which shall not be less than twenty-one years), his residence, and such evidence of his qualification and proficiency as may be prescribed by said Board, which application shall be accompanied by twenty-five dollars. If said application is satisfactory to the Board, then the applicant shall be entitled to an examination to determine his qualifications. If the result of the examination of any applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to practice architecture in North Carolina. Any person failing to pass such examination may be re-examined at any regular meeting of the Board without additional fee. (1915, c. 270, s. 3; 1919, c. 336, s. 1; C. S., s. 4992.)
- § 83-9. Refusal, revocation, or suspension of certificates. Said Board may refuse to grant certificate to any person convicted of a felony, or who, in the opinion of the Board, has been guilty of gross, unprofessional conduct, or who is addicted to habits of such character as to render him unfit to practice architecture. The Board of Architectural Examination and Registration may suspend for a period or revoke the certificate of admission to practice, and forbid practice by any architect upon conviction, after a fair and impartial trial, of any dishonest practice, unprofessional conduct, or incompetence. For the purpose of such trial, the Board shall have full power to subpoena and examine witnesses under oath as to the facts of the case. Any architect against whom charges are preferred

shall have not less than sixty days' notice before the trial of his case, and shall have the right to have witnesses subpoenaed in his behalf, and of being heard in person and by counsel. Any such trial shall be open to the public. (1915, c. 270, s. 5; 1919, c. 336, s. 3; C. S., s. 4993.)

- § 83-10. Examination fees; expenses of Board.—All examination fees shall be paid in advance to the treasurer of said Board of Architectural Examination and Registration. The State of North Carolina shall not be liable for the compensation of any members or officers of said Board. All expenses incurred by said Board in the necessary discharge of their duties shall be paid out of funds derived from examination fees herein provided for, and shall be paid by the treasurer upon warrant drawn by the secretary and approved by the president. The said Board shall have the power to determine what are necessary expenses and to fix the salaries of the respective officers. (1915, c. 270, s. 6; C. S., s. 4994.)
- § 83-11. Annual renewal of certificate; fee. Every architect continuing his practice in the State shall, on or before the first day of July in each year, obtain from the Board of Architectural Examination and Registration a renewal of his certificate for the ensuing year upon the payment of a fee of five dollars, and upon failure to do so shall have his certificate of admission to practice revoked, but such certificate may be renewed at any time within one year upon the payment of a fee of ten dollars. (1919, c. 336, s. 2; C. S., s. 4995.)
- § 83-12. Holding out as architect without having certificate; provisos.—Any person not registered under this chapter who shall advertise or put up a sign or card or other device, or in any other way hold himself out to the public as an architect, or practice architecture as herein defined, shall be guilty of a misdemeanor and punished by a fine not exceeding fifty dollars: Provided, however, that nothing herein shall prevent any person from making plans or data for buildings for themselves: Provided, further, that nothing in this chapter shall prevent any person from selling or furnishing plans for the construction of residence or farm or commercial buildings of a value not exceeding fifteen thousand dollars; provided, further, that nothing in this chapter shall prevent any registered engineer duly licensed in this State from furnishing design or supervision services for plants or structures which are elements of engineering projects or utilities: And provided further, that nothing in this chapter shall prevent the procuring of plans and specifications from an architect residing outside of this State. Nonresident architects who come within the State to do business shall be subject to the same examination and upon same terms and conditions as resident applicants, unless such nonresident architects are permitted to engage in business in this State under the terms of the preceding section. (1915, c. 270, s. 4; C. S., s. 4996; 1941, c. 369, ss. 1, 2.)

Editor's Note.—The 1941 amendment It also inserted the second and third proinserted in the first sentence the words visos and made changes in the first proviso. "or practice architecture as herein defined."

- § 83-13. Seal of registered architect; plans to bear seal. Every architect who shall have obtained from said Board a certificate, shall have a seal which must contain the name of the architect, his place of business, and the words "Registered Architect, of North Carolina," and he shall stamp all drawings and specifications issued from his office, for use in this State, with an impression of said seal. (1915, c. 270, s. 7; C. S., s. 4997.)
- § 83-14. County record of registered architects; fees.—Every person holding a certificate of said Board to practice architecture shall have said certificate recorded in the office of the clerk of the superior court of the county in which he resides or has his principal office. Said clerk shall record the same in a book to be kept by him, entitled "Record of Architecture," and the clerk shall be en-

titled to a fee of one dollar for recording such certificate: Provided, however, that in any counties where the clerk is on a salary and not on a fee basis, then the said fee of one dollar shall be paid into the county treasury. It shall be unlawful for any person to hold himself out as an architect until said certificate shall have been recorded, and any person found guilty of holding himself out as an architect without registration of his certificate, as aforesaid, shall be guilty of a misdemeanor, and fined not more than fifty dollars, in the discretion of the court. (1915, c. 270, s. 8; C. S., s. 4998.)

§ 83-15. Copy to registered architects.—A notice and copy of this chapter shall be mailed by the secretary of the State Board of Architectural Examination and Registration to each architect in and out of the State to whom a certificate has been issued under this chapter. (1919, c. 336, s. 3; C. S., 4993.)

Chapter 84.

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84-2. Persons disqualified.

84-2.1. "Practice law" defined.

84-3. Officers of inferior courts disqualified in certain cases.

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ARTICLE 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-1. Oaths taken in open court.—Attorneys before they shall be admitted to practice law shall, in open court before a justice of the supreme or judge of the superior court, take the oath prescribed for attorneys, and also the oaths of allegiance to the State, and to support the Constitution of the United States, prescribed for all public officers, and the same shall be entered on the records of the court; and, upon such qualification had, and oath taken, may act as attorneys during their good behavior. (1777, c. 115, s. 8; R. C., c. 9, s. 3; Code, s. 19; Rev., s. 209; C. S., s. 197.)

Nonresident Attorneys.—As this section it debars a citizen of another state from obrequires the oath of allegiance to the State,

taining a license to practice law, and a non-

resident attorney does not acquire the right to practice habitually in this State by having been previously allowed, through the courtesy of the courts, to appear in special cases. Manning v. Roanoke, etc., R. Co., 122 N. C. 824, 28 S. E. 963 (1898).

§ 84-2. Persons disqualified.—No clerk of the superior or Supreme Court, nor deputy or assistant clerk of said courts, nor register of deeds, nor sheriff, nor any justice of the peace, nor county commissioner shall practice law. Persons violating this provision shall be guilty of a misdemeanor and fined not less than two hundred dollars. This section shall not apply to Confederate soldiers. (C. C. P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C. S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543.)

Local Modification. — Burke: 1933, c.

135; Madison: 1935, c. 214.

Editor's Note.—Registers of deeds were, by the 1933 amendment, added to the list of those excluded from practice. The 1943

amendment made the former second paragraph of this section into a new section designated as § 84-2.1. That paragraph had been added by the 1941 amendment.

§ 84-2.1. "Practice law" defined.—The phrase "practice law" as used in this chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, or assisting by advice, counsel, or otherwise in any such legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of such term, but shall be construed to include the foregoing particular acts, as well as all other acts within said general definition. (C. C. P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C. S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543; 1945, c. 468.)

Editor's Note.—Prior to the 1943 amendment this section appeared as the second paragraph of § 84-2. It had been added as said paragraph by the 1941 amendment. For comment on the 1941 act, see 19 N. C. Law Rev. 454.

The 1945 amendment extended the definition of "practice law" to include "aiding in the preparation" of certain instruments and writings listed, added inventories and accounts to the list and inserted the provision as to petitions or orders in any probate or court proceeding.

What Constitutes Practicing Law. - To

constitute the practice of law, within the prohibition of this section, it is necessary that the person charged with its violation shall have customarily or habitually held himself out to the public as a lawyer, or that he have demanded compensation for his services as such. State v. Bryan, 98 N. C. 644, 4 S. E. 522 (1887).

The fact that a person on one occasion acted as an attorney for a party to an action is some evidence for the jury to consider, but is not conclusive of the question. State v. Bryan, 98 N. C. 644, 4 S. E. 522 (1887). See § 84-4.

§ 84-3. Officers of inferior courts disqualified in certain cases.— No judge or prosecuting attorney of any recorder's, municipal, or county court shall appear in any other court on behalf of the defendant in a criminal action, where such criminal action has been tried in the court of such officer. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars. (1917, c. 213; C. S., s. 199.)

Local Modification. — Iredell: 1917, c. 213, s. 3.

§ 84-4. Corporations and persons other than members of State Bar prohibited from practicing law; exceptions.—It shall be unlawful for any corporation or any person or association of persons, except members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys at law, to appear as attorney or counselor at law in any action or proceeding in any court in this State or before any judicial body or the North Carolina Industrial Commission or the Unemployment Compensation Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except members of the Bar, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, or, for or without a fee or any consideration, to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust serving purposes similar to those of a will, except life insurance trusts, or, for a fee or any consideration, to organize corporations or prepare for another person, firm or corporation, any other legal document. Provided, that nothing herein shall prohibit any person from conferring with a person, firm or corporation with respect to the creation of a fiduciary relationship, or from co-operating with a licensed attorney of another in preparing any such legal document, if such attorney maintains his own place of business and is not an officer of a corporation represented by such person; or from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney at law. (1931, c. 157, s. 1; 1937, c. 155, s. 1.)

Cross Reference. — As to officers disqualified to practice law, see § 84-2.

Editor's Note.—The 1937 amendment inserted the words "or the Unemployment Compensation Commission" immediately preceding the first semicolon in this section

This section is constitutional and valid, the right to practice law being subject to legislative regulation within constitutional restrictions and limitations, and the statute not being in contravention of any provision of the State or federal Constitutions. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936).

The right to practice law is personal and may not be exercised by a corporation either directly or indirectly by employing lawyers to practice for it. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936).

The practice of law is not limited to the conduct of cases in court, but embraces, in its general sense, legal advice and coun-

sel and the preparation of legal documents and contracts by which legal rights are secured, although such matter may or may not be pending in court. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936).

Services of Motor Clubs Held to Violate Section.-Where defendant corporations, as a part of their services, were engaged in giving legal advice, in employing attorneys for members, in allowing lay members of the incorporated club to write letters on club stationary to persons involved in accidents with members of the club advising that such persons were liable in damages in law for negligence in causing such accidents, and in drawing up receipts stating that a certain sum was received as settlement of such damages when collections were made as a result of such letters, they were held to be engaged in the practice of law in violation of this section. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936).

§ 84-5. Further prohibition as to practice of law by corporation; exceptions.—It shall be unlawful for any corporation to practice or appear as an attorney for any person other than itself in any court in this State, or before any judicial body or the North Carolina Industrial Commission or the Unemployment Compensation Commission, or hold itself out to the public or advertise as being entitled to practice law; and no corporation shall organize

corporations, or draw agreements, or other legal documents not relating to its lawful business, or draw wills, or practice law, or give legal advice not relating to its lawful business; or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular: Provided, that the foregoing shall not prevent a corporation from employing an attorney in regard to its own affairs or in any litigation to which it may be a party. Provided, further, that the above provisions of this section and § 84-4 shall not be construed to prohibit a person or corporation acting in a fiduciary capacity from transacting the necessary clerical business incidental to the routine or usual administration of estates, trusts, guardianships, or other similar fiduciary capacities, such as offering wills for probate in common form, securing authority to expend principal as guardian or trustee, filing accounts, preparing and filing tax returns of every nature, and other such administrative acts, where no special compensation is charged for such service and no compensation whatever is charged or received other than the usual commissions allowed by the court for administering the trust, or provided for by the instrument creating the trust or other fiduciary relationship. And provided, further, that nothing herein shall prohibit any insurance company from causing to be defended, or prosecuted, or from offering to cause to be defended, through lawyers of its own selection, the insured in policies issued or to be issued by it, in accordance with the terms of such policies; and shall not prohibit one such licensed attorney at law from acting for several common carriers and/or other corporations and/or associations or any of its subsidiaries pursuant to arrangement between said corporations and/or associations. (1931, c. 157, s. 2; 1937, c. 155, s. 2.)

Editor's Note.—The 1937 amendment inserted the words "or the Unemployment preceding the first semicolon in this section.

- § 84-6. Exacting fee for conducting foreclosures prohibited to all except licensed attorneys.—It shall be unlawful to exact, charge, or receive any attorney's fee for the foreclosure of any mortgage under power of sale, unless the foreclosure is conducted by licensed attorney at law of North Carolina, and unless the full amount charged as attorney's fee is actually paid to and received and retained by such attorney, without being directly or indirectly shared with or rebated to anyone else, and it shall be unlawful for any such attorney to make any showing that he has received such a fee unless he has received the same, or to share with or rebate to any other person, firm, or corporation such fee or any part thereof received by him; but such attorney may divide such fee with another licensed attorney at law maintaining his own place of business and not an officer or employee of the foreclosing party, if such attorney has assisted in performing the services for which the fee is paid, or resides in a place other than that where the foreclosure proceedings are conducted, and has forwarded the case to the attorney conducting such foreclosure. (1931, c. 157, s. 3.)
- § 84-7. Solicitors, upon application, to bring injunction or criminal proceedings.—The solicitor of any of the superior courts shall, upon the application of any member of the Bar, or of any bar association, of the State of North Carolina, bring such action in the name of the State as may be proper to enjoin any such person, corporation, or association of persons who it is alleged are violating the provisions of §§ 84-4 to 84-8, and it shall be the duty of the solicitors of this State to indict any person, corporation, or association of persons upon the receipt of information of the violation of the provisions of §§ 84-4 to 84-8. (1931, c. 157, s. 4.)

Cross Reference.—As to the power of the North Carolina State Bar to investigate and 84-37.

§ 84-8. Punishment for violations; legal clinics of law schools excepted.—Any person, corporation, or association of persons violating the

provisions of §§ 84-4 to 84-8 shall be guilty of a misdemeanor and punished by a fine or imprisonment, or both, in the discretion of the court. Provided, that §§ 84-4 to 84-8 shall not apply to any law school or law schools conducting a legal clinic and receiving as their clientage only those persons unable financially to compensate for legal advice or services rendered. (1931, c. 157, s. 5; c. 347.)

§ 84-9. Unlawful for anyone except attorney to appear for creditor in insolvency and certain other proceedings.—It shall be unlawful for any corporation, or any firm or other association of persons other than a law firm, or for any individual other than an attorney duly licensed to practice law, to appear for another in any bankruptcy or insolvency proceeding, or in any action or proceeding for or growing out of the appointment of a receiver, or in any matter involving an assignment for the benefit of creditors, or to present or vote any claim of another, whether under an assignment or transfer of such claim or in any other manner, in any of the actions, proceedings or matters hereinabove set out. (1931, c. 208, s. 2.)

Cross Reference.—As to unlawful solicitation of claims of creditors in insolvency, etc., proceedings, see § 23-46.

§ 84-10. Violation of preceding section a misdemeanor.—Any individual, corporation, or firm or other association of persons violating any provision of § 84-9 shall be guilty of a misdemeanor. (1931, c. 208, s. 3.)

ARTICLE 2.

Relation to Client.

§ 84-11. Authority filed or produced if requested.—Every attorney who claims to enter an appearance for any person shall, upon being required so to do, produce and file in the clerk's office of the court in which he claims to enter an appearance, a power or authority to that effect signed by the persons or some one of them for whom he is about to enter an appearance, or by some person duly authorized in that behalf, otherwise he shall not be allowed so to do: Provided, that when any attorney claims to enter an appearance by virtue of a letter to him directed (whether such letter purport a general or particular employment), and it is necessary for him to retain the letter in his own possession, he shall, on the production of said letter setting forth such employment, be allowed to enter his appearance, and the clerk shall make a note to that effect upon the docket. (R. C., c. 31, s. 57; Code, s. 29; Rev., s. 213; C. S., s. 200.)

Cross Reference. — As to general and specific appearances, see § 1-11.

Sufficiency of Writing.— The power of attorney which a lawyer may be required to file, pursuant to this section, is some writing addressed to him by the client or an agent for the client. Therefore, letters written by the client to third persons expressing gratification because of the employment of a particular attorney will not suffice to supply the want of power. Day v. Adams, 63 N. C. 254 (1869).

A power of attorney, signed by the purchaser of a note, in the name of the payee, is sufficient authority under this section for an attorney at law to appear in a cause in court, although the agent has no written authority to make the power. Johnson v.

Sikes, 49 N. C. 70 (1856).

A power of attorney given by a married woman to dismiss an action need not be registered. Hollingsworth v. Harman, 83 N. C. 153 (1880).

Time of Demand for Authority. — In Reece v. Reece, 66 N. C. 377 (1872), it is held that the defendant has the right, because of this section to demand the authority at the return term of a summons.

If the demand for the power of attorney is made at the return term, it is the practice and within the discretion of the judge to extend the time; if, however, such demand is not made at the proper time, and before the right to appear has been recognized, it comes too late, unless there are peculiar circumstances tending to excuse

the party for not making it in apt time. Reece v. Reece, 66 N. C. 377 (1872).

After an attorney has entered an appearance and has been recognized by the court as attorney in the cause, no written authority can be required of him at a subsequent time. This means that the opposite party shall not call in question his authority, unless he does so within the time and in accordance with the provision of this section. Day v. Adams, 63 N. C. 254 (1869); New Bern v. Jones, 63 N. C. 606 (1869).

When Client Present.—If a written au-

thority is required under this section the aftorney must produce the same, even if his client is present at the bar of the court. Day v. Adams, 63 N. C. 254 (1869).

Special Appearance for Nonresident.—Upon special appearance of the attorneys of a husband who was a nonresident and a fugitive from justice, and whose property had been attached by his wife, for the purpose of moving to dismiss the action, the court should, on motion made, have required them to file their written authority under this section. Walton v. Walton, 178 N. C. 73, 100 S. E. 176 (1919).

§ 84-12. Failure to file complaint, attorney liable for costs.—When a plaintiff is compelled to pay the costs of his suit in consequence of a failure on the part of his attorney to file his complaint in proper time, he may sue such attorney for all the costs by him so paid, and the receipt of the clerk may be given in evidence in support of such claim. (1786, c. 253, s. 6; R. C., c. 9. s. 5; Code, s. 22; Rev., s. 214; C. S., s. 201.)

This section is not exhaustive, and the courts have power to order counsel to pay costs of cases in which they have been guilty of gross negligence (even of a kind

not included in this section), such conduct being a sort of contempt. Ex parte Robins, 63 N. C. 309 (1869).

§ 84-13. Fraudulent practice, attorney liable in double damages.—If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages. (1743, c. 37; R. C., c. 9, s. 6; Code, s. 23; Rev., s. 215; C. S., s. 202.)

Aliens Prevented from Practicing.—In Ex parte Thompson, 10 N. C. 355, 362 (1824), the court said: "No one should be presented to the public under the panoply of such a license (to practice law), against whom an injured suitor would not have the full benefit of such legal remedy as the laws of the State provide, in the event of fraudulent or negligent practice." Hence the court reasoned that an alien could not

be admitted to practice, as actions under this section would be removable to the United States courts.

Presumption of Fraud.—The relation of attorney and client is one of a fiduciary character, and gives rise to a presumption of fraud when the former, in dealing with the latter, obtains an advantage. Egerton v. Logan, 81 N. C. 172 (1879).

ARTICLE 3.

Arguments.

§ 84-14. Court's control of argument.—In all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: To not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side. Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury

trials the whole case as well of law as of fact may be argued to the jury. (1903, c. 433; Rev., s. 216; C. S., s. 203; 1927, c. 52.)

Discretion of Court.—The trial judge has a large discretion in controlling and directing the argument of counsel, but, under this section, this does not include the right to deprive a litigant of the benefit of his counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case. Puett v. Caldwell, etc., R. Co., 141 N. C. 332, 53 S. E. 852 (1906); Irvir. v. Southern R. Co., 164 N. C. 5, 80 S. E. 78 (1913).

It is the duty of the judge to interfere when the remarks of counsel are not warranted by the evidence and are calculated to mislead or prejudice the jury. State v. Howley, 220 N. C. 113, 16 S. E. (2d) 705 (1941)

Counsel May Argue Both Law and Fact.—It is reversible error for the trial judge not to permit attorneys to argue law to the jury and to apply in the argument the decisions of the court as provided by this section. Howard v. Western Union Tel. Co., 170 N. C. 495, 87 S. E. 313 (1915).

Failure to charge upon a certain point is reversible error, especially after counsel has argued the whole case "as well of law as of fact" as is permitted by this section. Nichols v. Fibre Co., 190 N. C. 1, 128 S. E. 471 (1925). It is the duty of the trial judge to instruct the jury upon the law, and he may correctly tell them to disregard the law as argued to them by counsel. Sears, Roebuck & Co. v. Banking Co., 191 N. C. 500, 132 S. E. 468 (1926).

Wide latitude is given counsel in the exercise of the right to argue to the jury the whole case, as well of law as of fact,

but counsel is not entitled to travel outside of the record and argue facts not included in the evidence, and when counsel attempts to do so it is the right and duty of the court to correct the argument, either at the time or in the charge to the jury. State v. Little, 228 N. C. 417, 45 S. E. (2d) 542 (1947).

Reading and Commenting on Reported Cases.—As counsel have the right under this section to argue "the whole case as well of law as of fact," they may read to the jury reported cases and comment thereen; but the facts contained in the cases cannot be read as evidence of their existence in another case. Horah v. Knox, 87 N. C. 483 (1882).

Reading Dissenting Opinion as Law of Case.—It is not permissible for counsel, in his argument to the jury, to read a dissenting opinion by a Justice of the Supreme Court as the law of the case over the defendant's objection, and where this has been done a new trial will be awarded on the defendant's exception thereto. It is the duty of the trial court, either to direct counsel not to read the dissenting opinion or to plainly and unequivocally instruct that the dissenting opinion has no legal bearing upon the case. Conn v. Seaboard Air Line R. Co., 201 N. C. 157, 159 S. E. 331 (1931).

Limitation of Argument under Former Section.—See State v. Miller, 75 N. C. 73 (1876).

Cited in Teasley v. Burwell, 199 N. C. 18, 153 S. E. 607 (1930).

ARTICLE 4.

North Carolina State Bar.

§ 84-15. Creation of North Carolina State Bar as an agency of the State.—There is hereby created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina State Bar. (1933, c. 210, s. 1.)

Editor's Note.—For a review of this section and those immediately following, see 11 N. C. Law Rev. 191.

Quoted in In re Parker, 209 N. C. 693, 184 S. E. 532 (1936).

§ 84-16. Membership and privileges.—The membership of the North Carolina State Bar shall consist of three classes, active, honorary and inactive.

The active members shall be all persons who shall have heretofore obtained, or who shall hereafter obtain, a license or certificate, which shall at the time be valid and effectual, entitling them to practice law in the State of North Carolina, who shall have paid the membership dues hereinafter specified, unless classified as an inactive member by the council as hereinafter provided. No

person other than a member of the North Carolina State Bar shall practice in any

court of the State, except foreign attorneys as provided by statute.

The honorary members shall be (a) the Chief Justice and associate justices of the Supreme Court of North Carolina; (b) the judges of the superior courts of North Carolina; (c) all former judges of the above-named courts resident in North Carolina, but not engaged in the practice of law; (d) judges of the district courts of the United States and of the circuit court of appeals resident in North Carolina.

Inactive members shall be all persons found by the council to be not engaged in the practice of law and not holding themselves out as practicing attorneys and not occupying any public or private positions in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal

effect of any act, document, or law.

Only active members shall be required to pay annual membership fees, and shall have the right to vote. A member shall be entitled to vote at all annual or special meetings of the North Carolina State Bar, and at all meetings of and elections held by the bar of each of the judicial districts in which he resides: Provided, that if he desires to vote with the bar of some district in which he practices, other than that in which he resides, he may do so upon filing with the resident judge of the district in which he desires to vote, and with the resident judge of the district in which he resides (and, after the North Carolina State Bar shall have been organized as hereinafter set forth, with the secretary-treasurer of the North Carolina State Bar), his statement in writing that he desires to vote in such other district: Provided, however, that in no case shall he be entitled to vote in more than one district. (1933, c. 210, s. 2; 1939, c. 21, s. 1; 1941, c. 344, ss. 1, 2, 3.)

Editor's Note.—The 1939 amendment inserted the requirement as to payment of membership dues in the second paragraph. The 1941 amendment, in making this section applicable to inactive members,

changed the first two paragraphs and inserted the fourth paragraph.

For comment on the 1939 and 1941 amendments, see 17 N. C. Law Rev. 341. and 19 N. C. Law Rev. 453.

§ 84-17. Government.—The government of the North Carolina State Bar shall be vested in a council of the North Carolina State Bar, hereinafter referred to as the "council," consisting of one councilor from each judicial district of the State, to be appointed or elected as hereinafter set forth, and the officers of the North Carolina State Bar, who shall be ex officio members during their respective terms of office. Notwithstanding any provisions of this article as to the voting powers of members, the council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters, except as otherwise directed or overruled, as in § 84-33 provided. The councilors elected shall serve as follows: Those elected from the first, fourth, seventh, tenth, thirteenth, sixteenth, and nineteenth districts shall serve for one year from the date of their elections; those elected from the second, fifth, eighth, eleventh, fourteenth, seventeenth, and twentieth districts shall serve for two years from the date of their election; and those elected from the third, sixth, ninth, twelfth, fifteenth, and eighteenth districts shall serve for three years from the date of their election: Provided, that upon the election of successors to the councilors first elected, the term of office and the period for which such councilors are elected shall be three years from the date of election.

All councilors elected from any additional judicial districts shall be elected for a term of three years. (1933, c. 210, s. 3; 1937, c. 51, s. 1.)

Editor's Note.—The 1937 amendment cillor nor any officer of the council or of struck out the former last paragraph of the North Carolina State Bar shall be

this section, providing: "Neither a coundeemed as such to be a public officer as

that phrase is used in the Constitution and laws of the State of North Carolina."

For discussion of the 1937 amendment, see 15 N. C. Law Rev. 330.

§ 84-18. Election of councilors.—Within thirty days after this article shall have gone into effect the judge of each judicial district shall, by notice posted at the front door of each courthouse within his district and by such other means as he shall think desirable, call a meeting of the attorneys residing within his district, and any others who may declare in writing their desire to be affiliated with that district, as hereinabove provided, for the purpose of organizing the bar of the district, the said meeting to be held at a place deemed by the judge to be convenient, on a day fixed, not less than twenty nor more than thirty days from posting of notice. At that meeting such attorneys as attend shall constitute a quorum, and shall forthwith form such organization herein referred to as the "district bar," as they may deem advisable, of which organization all active members of the North Carolina State Bar entitled to vote in that district shall be members. The district bar shall be the subdivision of the North Carolina State Bar for that judicial district, and shall adopt such rules, regulations and bylaws not inconsistent with this article as it shall see fit, a copy of which shall be transmitted to the secretary-treasurer of the North Carolina State Bar when organized; and copies of any amendments of such rules, regulations, and bylaws shall likewise be sent to said secretary-treasurer. The district bar so formed shall, at the time of its formation, elect a councilor to represent that district, and all subsequent elections of councilors, whether for regular terms or to fill vacancies, shall be held as provided by the said rules, regulations, and bylaws so adopted by the district bar. In case the judge of any judicial district, by reason of physical disability or otherwise, shall fail to call the meeting aforesaid within thirty days after this article shall have gone into effect, the same may be called within thirty days thereafter by any two attorneys residing in said district, by written notice signed by them and delivered to the clerk of the court of each county in the district to be posted at the front door of each courthouse as aforesaid, the said meeting to be held on a day fixed not less than twenty nor more than thirty days after the posting of said notice; and thereupon the same proceedings shall take place as though the meeting had been called by the judge as aforesaid. Any clerk to whom any such notice shall be delivered to be posted shall immediately post the same and shall write upon the said notice the exact date and time when the same is so posted. In case more than one notice shall be posted hereunder by different groups of attorneys, that posted first in point of time shall prevail and be deemed to be the notice provided for under this article. Pending the organization of the council as hereinafter provided, notification of the election of each councilor shall be sent within five days after such election by the secretary of the district bar to the clerk of the Supreme Court of North Carolina; but after the organization of the council such notices shall be sent to its secretary-treasurer. In case neither the judge nor any two members shall call a meeting as aforesaid, a councilor for the said district, residing therein, shall be named at a meeting of such members of the council as shall have been elected in accordance herewith, to serve until such district bar shall be organized under the provisions of this article (except as to the time for calling meetings), either on the call of the judge of the district court or of two members of the bar, and shall have elected a councilor to serve for the unexpired term of the councilor so named. (1933, c. 210, s. 4.)

§ 84-19. Change of judicial districts.—In the event that a new district shall hereafter be carved out of an existing district, the councilor for the old district shall remain in office and continue to represent the district constituting that portion of the old district in which he resides or with which he has elected to be affiliated; and within thirty days after the division of the old district shall have become effective, or so soon thereafter as practicable, the same procedure

shall be followed for the organization of the North Carolina State Bar, constituting the remaining and unrepresented portion of the old district, and for the election of a councilor to represent the same, as is prescribed by § 84-18; and if a new district or more than one new district shall be formed by a recombination or reallocation of the counties in more than one existing district, the same procedure shall be followed as is prescribed by § 84-18, in said new district, or in each of them if there be more than one, within thirty days after the election or appointment of the judge or judges thereof; but in that event the office of councilor for each of the old districts the counties in which shall have been so recombined into or reallocated to such new district or districts shall cease, determine, and become vacant so soon as the bar or bars of such new district, or all of such new districts if there shall be more than one, shall have been organized and shall have elected a councilor or councilors therefor, but not earlier: Provided, that if at such time any councilor whose office shall thus become vacant be actually serving upon a committee before which there is pending any trial of a case of professional misconduct or malpractice, he shall, notwithstanding the election of a new councilor, continue to serve as councilor for the purpose of trying such case until judgment shall have been rendered therein. (1933, c. 210, s. 5.)

§ 84-20. Compensation of councilors.—The members of the council and members of committees when actually engaged in the performance of their duties, including committees sitting upon disbarment proceedings, shall receive as compensation, not exceeding ten (\$10.00) dollars per day for the time spent in attending meetings, together with an expense allowance as follows: For subsistence—hotel and meals—not exceeding four dollars per day; for transportation, actual mileage, except when using personally owned automobiles, in which case a sum not exceeding five cents per mile of travel. The council shall determine per diem, subsistence and mileage to be paid. Such allowance as may be fixed by the council shall be paid by the secretary-treasurer of the North Carolina State Bar upon certified statements presented by each member. (1933, c. 210, s. 6; 1935, c. 34.)

Editor's Note.—The part of this section requiring that the members be "actually following the colon was added by the 1935 engaged in the performance of their duamendment, which also added the provision ties".

§ 84-21. Organization of council; publication of rules, regulations and bylaws.—Upon receiving notification of the election of a councilor for each judicial district, or, if such notification shall not have been received from all said districts, within one hundred and twenty (120) days after this article shall have gone into effect, the clerk of the Supreme Court of North Carolina shall call a meeting of the councilors of whose election he shall have been notified, to be held in the city of Raleigh not less than twenty days nor more than thirty days after the date of said call; and at the meeting so held the councilors attending the same shall proceed to organize the council by electing officers, taking appropriate steps toward the adoption of rules and regulations, electing councilors for judicial districts which have failed to elect them, and taking such other action as they may deem to be in furtherance of this article. The regular term of all officers shall be one year, but those first elected shall serve until the first day of January, one thousand nine hundred thirty-five. The council shall be the judge of the election and qualifications of its own members. When the council shall have been fully organized and shall have adopted such rules, regulations and bylaws, not inconsistent with this article, as it shall deem necessary or expedient for the discharge of its duties, the secretary-treasurer shall file with the clerk of the Supreme Court of North Carolina a certificate, to be called the "certificate of organization," showing the officers and members of the council, with the judicial districts which the members respectively represent, and their post-office

addresses, and the rules, regulations and bylaws adopted by it; and thereupon the Chief Justice of the Supreme Court of North Carolina, or any judge thereof, if the court be then in vacation, shall examine the said certificate and, if of opinion that the requirements of this article have been complied with, shall cause the said certificate to be spread upon the minutes of the court; but if of opinion that the requirements of this article have not been complied with, shall return the said certificate to the secretary-treasurer with a statement showing in what respects the provisions of this article have not been complied with; and the said certificate shall not be again presented to the Chief Justice of the Supreme Court or any judge thereof, until any such defects in the organization of the council shall have been corrected, at which time a new certificate of organization shall be presented and the same course taken as hereinabove provided, and so on until a correct certificate showing the proper organization of the council shall have been presented, and the organization of the council accordingly completed. Upon (a) the entry of an order upon the minutes of the court that the requirements of this article have been complied with, or (b) if for any reason the Chief Justice or judge should not act thereon within thirty days, then, after the lapse of thirty days from the presentation to the Chief Justice or judge, as the case may be, of any certificate of organization hereinabove required to be presented by the secretary-treasurer, without either the entry of an order or the return of said certificate with a statement showing the respects in which this article has not been complied with, the organization of the council shall be deemed to be complete, and it shall be vested with the powers herein set forth; and the certificate of organization shall thereupon forthwith be spread upon the minutes of the court. A copy of the certificate of organization, as spread upon the minutes of the court, shall be published in the next ensuing volume of the North Carolina Reports. The rules and regulations set forth in the certificate of organization, and all other rules and regulations which may be adopted by the council under this article, may be amended by the council from time to time in any manner not inconsistent with this article. Copies of all such rules and regulations adopted subsequently to the filing of the certificate of organization, and of all amendments so made by the council, shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by it upon its minutes, and published in the next ensuing number of the North Carolina Reports: Provided, that the court may decline to have so entered upon its minutes any of such rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this article. (1933, c. 210, s. 7.)

§ 84-22. Officers and committees of the North Carolina State Bar.—The officers of the North Carolina State Bar shall be a president, a first vice-president, a second vice-president, and a secretary-treasurer, who shall be deemed likewise to be the officers, with the same titles, of the council. Their duties shall be prescribed by the council. The president and vice-presidents shall be elected by the members of the North Carolina State Bar at its annual meeting, and the secretary-treasurer shall be elected by the council. All officers shall hold office for one year and until their successors are elected and qualified. The officers need not be members of the council. (1933, c. 210, s. 8; 1941, c. 344, ss. 4, 5.)

Editor's Note.—Prior to the 1941 amendment there was only one vice-president.

§ 84-23. Powers of council.—Subject to the superior authority of the General Assembly to legislate thereon by general laws, and except as herein otherwise limited, the council is hereby vested, as an agency of the State, with the control of the discipline, disbarment and restoration of attorneys practicing law in this State: Provided, that from any order suspending an attorney from the practice of law and from any order disbarring an attorney, an appeal shall lie in the manner hereinafter provided, to the superior court of the county where-

in the attorney involved resides. The council shall have power to administer this article; to formulate and adopt rules of professional ethics and conduct; to publish an official journal concerning matters of interest to the legal profession, and to do all such things necessary in the furtherance of the purposes of this article as are not prohibited by law. (1933, c. 210, s. 9; 1935, c. 74, s. 1; 1937, c. 51, s. 2.)

Editor's Note.—The words "and restoration" in the first sentence were inserted by the 1935 amendment. Prior to the 1937 amendment an appeal lay "as of right" to the regular superior court judge.

In State v. Hollingsworth, 206 N. C. 739, 175 S. E. 99 (1934), construing C. S. § 205, it was held that the court was without authority to set aside a judgment of disbarment on motion, especially since the enact-

ment of this and subsequent sections.

Confession of Guilt.—Where an attorney has confessed in open court to four crimes, all involving moral turpitude, and he has been disbarred from practicing in the district court of the United States, disbarment must ultimately result regardless of this and the following sections. In re Brittain, 214 N. C. 95, 197 S. E. 705 (1938).

§ 84-24. Admission to practice.—The provisions of the law now obtaining with reference to admission to the practice of law, as amended, and the rules and regulations prescribed by the Supreme Court of North Carolina with reference thereto, shall continue in force until superseded, changed or modified by or under the provisions of this article.

For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of seven members of the Bar, elected by the council of the North Carolina State Bar, who need not be members of the council. No teacher in any law school, however, shall be eligible. The members of the Board of Law Examiners elected from the Bar shall each hold office for a term of three years: Provided, that the members first elected shall hold office, two for one year, two for two years, and two for three years.

The secretary of the North Carolina State Bar shall be the secretary of the Board, and serve without additional pay. The Board of Law Examiners shall elect a member of said Board as chairman thereof, who shall hold office for such period as said Board may determine.

The examination shall be held in such manner and at such times as the Board of Law Examiners may determine, but no change in the time or place shall become effective within one year from the date upon which the change is determined, except that during the years 1947, 1948, 1949, 1950 and 1951 the Board of Law Examiners may provide for an additional regular examination to be held in Raleigh to commence on the first Tuesday in March of each of said years or upon such other date as the Board may determine after consideration of the needs of qualified applicants and issue license if otherwise qualified.

The Board of Law Examiners, subject to the approval of the council, shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the data of the adoption of such change.

from the date of the adoption of such change.

All such rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in § 84-21 in relation to the certificate of organization and the rules and regulations of the council.

Whenever the council shall order the restoration of license to any person as authorized by § 84-32, it shall be the duty of the Board of Law Examiners to issue a written license to such person, noting thereon that the same is issued in compliance with an order of the council of the North Carolina State Bar, whether the license to practice law was issued by the Board of Law Examiners

or the Supreme Court in the first instance. (1933, c. 210, s. 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, s. 6; 1947, c. 77.)

Cross References.—As to discipline and disbarment, see § 84-28. As to restoration of license to practice law, see § 84-32.

Editor's Note.—Prior to the 1935 amendments this section provided that a member of the Supreme Court should act as a member of the Board of Law Examiners. The second 1935 amendment struck out this provision and changed the number of members of the Bar serving on the Board from six to seven. The first 1935 amendment re-

pealed provisions relative to fees of applicants and to compensation of the Board, previously included in this section, by enacting new and different provisions. These subjects are now provided for in §§ 84-25 and 84-26.

The 1941 amendment added the paragraph at the end of the section, and the 1947 amendment added the exception clause to the fourth paragraph.

- § 84-25. Fees of applicants.—All applicants for examination before the Board of Law Examiners for license to practice law in North Carolina shall pay a filing fee of one dollar and fifty cents (\$1.50) and shall deposit with the secretary of the Board of Law Examiners the sum of twenty-two and 0/100 (\$22.00) dollars, of which sum two dollars shall be a deposit to pay for license, if issued. Any applicant who shall fail to pass examination shall receive a refund of twelve dollars from said twenty-two dollars deposit. (1935, c. 33, s. 1.)
- § 84-26. Pay of Board of Law Examiners.—Each member of the Board of Law Examiners shall receive the sum of fifty dollars for his services in connection with each examination and shall receive his actual expenses of travel and subsistence while engaged in duties assigned to him, provided that for transportation by the use of private automobile the expense of travel shall not exceed five cents per mile. (1935, c. 33, s. 2; 1937, c. 35.)

Editor's Note.—Prior to the 1937 amendment the maximum for subsistence was four dollars per day.

- § 84-27: Repealed by Session Laws 1945, c. 782.
- § 84-28. Discipline and disbarment.—The council or any committee of its members appointed for that purpose shall have jurisdiction to hear and determine all complaints, allegations, or charges of malpractice, corrupt or unprofessional conduct, or the violation of professional ethics, made against any member of the North Carolina State Bar; may administer the punishments of private reprimand, suspension from the practice of law for a period not exceeding twelve months, and disbarment as the case shall in their judgment warrant, for any of the following causes: 1. Commission of a criminal offense showing professional unfitness; 2. Detention without a bona fide claim thereto of property received or money collected in the capacity of attorney; 3. Soliciting professional business; 4. Conduct involving willful deceit or fraud or any other unprofessional conduct; 5. Detention without a bona fide claim thereto of property received or money collected in any fiduciary capacity; 6. The violation of any of the canons of ethics which have been adopted and promulgated by the council of the North Carolina State Bar; may invoke the processes of the courts in any case in which they deem it desirable to do so, and shall formulate rules of procedure governing the trial of any such person which shall conform as near as may be to the procedure now provided by law for hearings before referees in compulsory references. Such rules shall provide for notice of the nature of the charges and an opportunity to be heard; for a complete record of the proceedings for purposes of appeal to the superior court of the county wherein the attorney involved resides on the record made before the council or the committee as the case may be. Upon such appeal to the superior court the accused attorney shall have the right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before

the trial committee or council. From the decision of the superior court the council and the accused attorney shall each have the right of appeal to the Supreme Court of North Carolina. Trial before the committee appointed for that purpose by the council shall be held in the county in which the accused member resides: Provided, however, that the committee conducting the hearing shall have power to remove the same to any county in which the offense, or any part thereof, was committed, if in the opinion of such committee the ends of justice or convenience of witnesses require such removal. The procedure herein provided shall apply in all cases of discipline or disbarments arising under this section. (1933, c. 210, s. 11; 1937, c. 51, s. 3.)

Cross References.—As to restoration of license, see § 84-32. As to issuance of written license upon restoration of license, see § 84-24.

Editor's Note.—The 1937 amendment rewrote this section.

Most of the cases cited under this section were decided under former statutes similar in subject matter to the present section.

Constitutionality. — Laws 1870-1, c. 216, s. 4, an early statute dealing with the same subject matter as this section, was constitutional. It did not take away any of the inherent rights which are absolutely essential in the administration of justice. Exparte Schenk, 65 N. C. 353 (1871).

Disbarment Is to Protect Public.—An order disbarring an attorney upon his conviction of a felony is not entered as additional punishment, but as a protection to the public. State v. Spivey, 213 N. C. 45, 195 S. E. 1 (1938).

Civil Action. — Proceedings for disbarment are of a civil nature. In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190 (1908).

Former Law a "Disabling Statute."—The act of 1871, upon which C. S., §§ 204 and 205, were based, failed to provide any power to take the place of the power formerly invested in the courts, and so was a disabling statute. Kane v. Haywood, 66 N. C. 1 (1872); In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190 (1908). See § 84-36.

Disbarment for Crime—Nature of Offense.—Under Laws 1870-1, c. 216, s. 4, upon which an action for disbarment was originally based, conviction of a "criminal offense" showing untrustworthiness was sufficient basis for disbarment; but by Laws 1907, c. 941, s. 1, conviction of a "felony" was necessary; construing these provisions together the court, in State v. Johnson, 171 N. C. 799, 88 S. E. 437 (1916), held that the two provisions were consistent and reconcilable (a view evidently adopted by the Revision Commission of 1920, as C. S. § 205 contained the language of both provisions), and further stated that the conviction of a criminal offense—the illegal sale of liquor—was sufficient grounds

for disbarment as showing the attorney unfit for practice. See also State v. Johnson, 174 N. C. 345, 93 S. E. 847 (1917).

It having appeared to the court that the defendant was guilty of an infamous misdemeanor, converted to a felony by §§ 14-1, 14-3, the court by virtue of its inherent power was authorized to order his name stricken from the rolls of attorneys and his license to practice law in the State of North Carolina returned to the Supreme Court, which issued it. State v. Spivey, 213 N. C. 45, 195 S. E. 1 (1938).

Same — Conviction or Confession of Guilt.—The words "conviction" and "confession," as used in a former statute providing that no attorney should be disbarred for crime unless upon conviction or confession in open court, must be construed to convey the idea that the party had been convicted by a jury or had in open court declined to take issue by the plea of not guilty, and confessed himself guilty. Kane v. Haywood, 66 N. C. 1 (1872).

So the admission of an attorney in an answer to a rule to show cause why he should not be attached for contempt for failure to pay money into court, not being voluntary, was not a confession in open court as contemplated by the statute. Kane v. Haywood, 66 N. C. 1 (1872).

Same—Indictment.—By a proper construction of the former statute, the court was shorn of its power to disbar an attorney, except in the single instance where he had been indicted for some criminal offense, showing him unfit to be trusted in the discharge of the duties of his profession, and upon such indictment had either been convicted or pleaded guilty. Kane v. Haywood, 66 N. C. 1 (1872).

Same — Conviction in Foreign State.—Laws 1870-1, c. 216, s. 4, and Laws 1907, c. 941, s. 1, did not confer upon the court the power to disbar an attorney because he had been "convicted" in the courts of another state or of the United States. In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190 (1908).

Same—Confession of a Felony.—A plea of guilty to an indictment charging defend-

ant with willfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue, etc., was held a confession of a felony, and ground for disbarment if defendant was a practicing attorney, under former § 205 of the Consolidated Statutes. State v. Harwood, 206 N. C. 87, 173 S. E. 24 (1934).

Detention of Money or Property.—Under this section the detention of money re-

ceived in his professional capacity without bona fide claim thereto is ground for the disbarment of an attorney. In re Encoffery, 216 N. C. 19, 3 S. E. (2d) 425 (1939).

Fine and imprisonment is not the appropriate remedy to be applied to an attorney who, by reason of moral delinquency or other cause, has shown himself to be an unworthy member of the profession. Kane v. Haywood, 66 N. C. 1 (1872).

§ 84-29. Concerning evidence and witness fees .- In any investigation of charges of professional misconduct the council and any committee thereof shall have power to summon and examine witnesses under oath, and to compel their attendance, and the production of books, papers, and other documents or writings deemed by it necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary-treasurer or the president of the council or the chairman of the committee appointed to hear the charges, and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness or other person who shall refuse or neglect to appear in obedience thereto, or to testify or produce the books, papers, or other documents or writings required, shall be liable to punishment for contempt either by the council or its committee, but with the right to appeal therefrom. Depositions may be taken in any investigations of professional misconduct as in civil proceedings; but the council or the committee hearing the case may, in its discretion, whenever it believes that the ends of substantial justice so require, direct that any witness within the State be brought before it. Witnesses giving testimony under a subpoena before the council or any committee thereof or by deposition shall be entitled to the same fees as in civil actions.

In cases heard before the council or any committee thereof, if the party shall be convicted of the charges against him, he shall be taxed with the cost of the hearings: Provided, however, that such bill of costs shall not include any compensation to the members of the council or committee before whom the hearings are conducted. (1933, c. 210, s. 12.)

- § 84-30. Rights of accused person.—Any person who shall stand charged with an offense cognizable by the council or any committee thereof shall have the right to invoke and have exercised in his favor the powers of the council and its committees in respect of compulsory process for witnesses and for the production of books, papers, and other writings and documents, and shall also have the right to be represented by counsel. (1933, c. 210, s. 13.)
- § 84-31. Designation of prosecutor; compensation.—Whenever charges shall have been preferred against any member of the Bar, and the council shall have directed a hearing upon the charges, it shall also designate some member of the Bar to prosecute said charges in such hearings as may be held, including hearing upon appeals in the superior and supreme courts. The council may allow the attorney performing such services at its request such compensation as it may deem proper. (1933, c. 210, s. 14.)
- § 84-32. Records and judgments and their effect; restoration of licenses.—In the case of persons charged with an offense cognizable by the council or any committee thereof, a complete record of the proceedings and evidence taken before the council or any committee thereof shall be made and preserved in the office of the secretary-treasurer, but the council may, upon sufficient cause shown and with the consent of the person so charged, cause the same to be expunged and destroyed. Final judgments of suspension or disbarment shall

be entered upon the judgment docket of the superior court of the county wherein the accused resides, and also upon the minutes of the Supreme Court of North

Carolina; and such judgment shall be effective throughout the State.

Whenever any attorney has been deprived of his license, the council, in its discretion, may restore said license upon due notice being given and hearing had and satisfactory evidence produced of proper reformation of the licentiate before restoration. (1933, c. 210, s. 15; 1935, c. 74, s. 2.)

Cross Reference.—As to issuance of written license upon restoration of license to practice, see § 84-24.

Editor's Note. — The 1935 amendment

struck out the words "under the provisions of this article" after the word "license" where it first appears in the second paragraph.

§ 84-33. Annual and special meetings.—There shall be an annual meeting of the North Carolina State Bar, open to all members in good standing, to be held at such place and time after such notice (but not less than thirty days) as the council may determine, for the discussion of the affairs of the Bar and the administration of justice; and special meetings of the North Carolina State Bar may be called, on not less than thirty days' notice, by the council, or on the call, addressed to the council, of not less than twenty-five per cent of the active members of the North Carolina State Bar; but at special meetings no subjects shall be dealt with other than those specified in the notice. Notice of all meetings, whether annual or special, may be given by publication in such newspapers of general circulation as the council may select, or, in the discretion of the council, by mailing notice to the secretary of the several district bars or to the individual active members of the North Carolina State Bar. The North Carolina State Bar shall not take any action in respect of any decision of the council or any committee thereof relating to admission, exclusion, discipline or punishment of any person or other action, save after notice in writing of the action of the council or committee proposed to be directed or overruled, which notice shall be given to the secretary-treasurer thirty days before the meeting, who shall give, by mail, at least fifteen days' notice to the members of the North Carolina State Bar, and unless at the meeting two-thirds of the members present and voting shall favor the motion to direct or overrule. At any annual or special meeting ten per cent of the active members of the Bar shall constitute a quorum; but there shall be no voting by proxy. (1933, c. 210, s. 16.)

§ 84-34. Membership fees and list of members.—Every active member of the North Carolina State Bar shall on or before the first day of January, nineteen hundred and thirty-four, pay to the secretary-treasurer, without demand therefor, in respect of the calendar year nineteen hundred and thirty-three, a membership fee of three dollars, and shall thereafter, prior to the first day of July of each year, beginning with and including the year nineteen hundred and thirty-four, pay to the secretary-treasurer, in respect of the calendar year in which such payment is herein directed to be made, an annual membership fee of three dollars, and shall thereafter, prior to the first day of July of each year, beginning with the calendar year one thousand nine hundred and thirty-nine, pay to the secretary-treasurer, in respect to the calendar year in which such payment is herein directed to be made, an annual membership fee of five dollars; and in every case the member so paying shall notify the secretary-treasurer of his correct post-office address. The said membership fee shall be regarded as a service charge for the maintenance of the several services prescribed in this article, and shall be in addition to all fees now required in connection with admissions to practice, and in addition to all license taxes now or hereafter required by law. The said fee shall not be prorated: Provided, that no fee shall be required of an attorney licensed after this article shall have gone into effect until the first day of July of the second calendar year (a "calendar year" for the purposes of this article being treated as the period from January first to December

thirty-first) following that in which he shall have been licensed; but this provise shall not apply to attorneys from other states admitted on certificate. The said fees shall be disbursed by the secretary-treasurer on the order of the council. The secretary-treasurer shall annually, at a time and in a law magazine or daily newspaper to be prescribed by the council, publish an account of the financial transactions of the council, in a form to be prescribed by it. The secretary-treasurer shall compile and keep currently correct from the names and post-office addresses forwarded to him and from any other available sources of information a list of members of the North Carolina State Bar and furnish to the clerk of the superior court in each county, not later than the first day of October in each year, a list showing the name and address of each attorney for that county who has not complied with the provisions of this article. The name of each of the active members who shall be in arrears in the payment of membership fees for one or more calendar years shall be furnished to the presiding judge at the next term of the superior court after the first day of October of each year, by the clerk of the superior court of each county wherein said member or members reside. and the court shall thereupon take such action as is necessary and proper. The names and addresses of such attorneys so certified shall be kept available to the public. The Commissioner of Revenue is hereby directed to supply the secretarytreasurer, from his record of license tax payments, with any information for which the secretary-treasurer may call in order to enable him to comply with this requirement. (1933, c. 210, s. 17; 1939, c. 21, ss. 2, 3.)

Cross Reference.—As to who is an active member, see § 84-16. wrote this section. For comment on the amendment, see 17 N. C. Law Rev. 341.

Editor's Note.—The 1939 amendment re-

§ 84-35. Saving as to North Carolina Bar Association.—Nothing in this article contained shall be construed as affecting in any way the North Carolina Bar Association, or any local bar association. (1933, c. 210, s. 18.)

§ 84-36. Inherent powers of courts unaffected.—Nothing contained in this article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys. (1937, c. 51, s. 4.)

Statutory Method of Disbarment Not Exclusive.—C. S., §§ 204 and 205, restricting the power of courts to disbar attorneys, were repealed by Laws 1933, c. 210, s. 20, and the statutory method of disbarment provided by the Act of 1933 is not exclusive, but on the contrary the act recognizes the inherent power of the courts, and the

courts have jurisdiction to order the disbarment of an attorney upon his conviction of an infamous misdemeanor, converted to a felony by §§ 14-1 and 14-3. State v. Spivey, 213 N. C. 45, 195 S. E. 1 (1938). See State v. Johnson, 174 N. C. 345, 93 S. E. 847 (1917).

§ 84-37. State Bar may investigate and enjoin unauthorized practice.—The council or any committee of its members appointed for that purpose may inquire into and investigate any charges or complaints of unauthorized or unlawful practice of law. The council may bring or cause to be brought and maintain in the name of the North Carolina State Bar an action or actions, upon information or upon the complaint of any private person or of any bar association against any person, partnership, corporation or association and any employee, agent, director, or officer thereof who engages in rendering any legal service or makes it a practice or business to render legal services which are unauthorized or prohibited by law or statutes relative thereto. No bond for cost shall be required in such proceeding.

(a) In an action brought under this section the final judgment if in favor of the plaintiff shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted upon proof or by affidavit, that the defendant or defendants have violated any of the

laws or statutes applicable to unauthorized or unlawful practice of law. The provisions of statute or rules relating generally to injunctions as provisional remedies in actions shall apply to such a temporary injunction and the proceedings thereunder.

(b) The venue for actions brought under this section shall be the superior court of any county in which such acts constituting unauthorized or unlawful practice of law are alleged to have been committed or in which there appear reasonable grounds that they will be committed or in the county where the defendants in such action reside.

(c) The plaintiff in such action shall be entitled to examination of the adverse party and witnesses before filing complaint and before trial in the same manner

as provided by law for the examination of parties.

(d) This section shall not repeal or curtail any remedy now provided in cases of unauthorized or unlawful practice of law, and nothing contained herein shall be construed as disabling or abridging the inherent powers of the court in such matters. (1939, c. 281.)

Cross Reference.—As to the power of any solicitor of any of the superior courts to bring injunction or criminal proceedings,

see § 84-7.

Editor's Note. - For comment on this section, see 17 N. C. Law Rev. 342.

84-38. Solicitation of retainer or contract for legal services prohibited; division of fees .- It shall be unlawful for any person, firm, corporation, or association or his or their agent, agents, or employees, acting on his or their behalf, to solicit or procure through solicitation either directly or indirectly, any legal business, whether to be performed in this State or elsewhere, or to solicit or procure through solicitation either directly or indirectly, a retainer or contract, written or oral, or any agreement authorizing an attorney or any other person, firm, corporation, or association to perform or render any legal

services, whether to be performed in this State or elsewhere.

It shall be unlawful for any person, firm, corporation, or association to divide with or receive from any attorney at law, or group of attorneys at law, whether practicing in this State or elsewhere, either before or after action is brought, any portion of any fee or compensation charged or received by such attorney at law, or any valuable consideration or reward, as an inducement for placing or in consideration of being placed in the hands of such attorney or attorneys at law, or in the hands of another person, firm, corporation or association, a claim or demand of any kind, for the purpose of collecting such claim or instituting an action thereon or of representing claimant in the pursuit of any civil remedy for the recovery thereof, or for the settlement or compromise thereof, whether such compromise, settlement, recovery, suit, claim, collection or demand shall be in this State or elsewhere. This paragraph shall not apply to agreements between attorneys to divide compensation received in cases or matters legitimately, lawfully and properly received by them.

Any person, firm, corporation or association of persons violating the provisions of this section shall be guilty of a misdemeanor and punished by fine or imprison-

ment or both in the discretion of the court.

The council of the North Carolina State Bar is hereby authorized and empowered to investigate and bring action against persons charged with violations of this section and the provisions as set forth in § 84-37 shall apply. Nothing contained herein shall be construed to supersede the authority of solicitors to seek injunctive relief or institute criminal proceedings in the same manner as provided for in § 84-7. Nothing herein shall be construed as abridging the inherent powers of the courts to deal with such matters. (1947, c. 573.)

Editor's Note.-For discussion of the purposes of this section, see 25 N. C. Law Rev. 379.

Chapter 85.

Auctions and Auctioneers.

Article 1.

In General.

Sec.

85-1. Application of article.

85-2. Appointment; bond.

85-3. Requirements of law and of Commissioner of Revenue; false statement.

85-4. Punishment for violation of law. 85-5. License tax by counties and munic-

ipalities.

85-6. Account semiannually; pay over moneys received.

85-7. Acting without appointment; penalty.

85-8. Commissions; one per cent to town.

85-9. Power of Commissioner of Revenue to revoke licenses of auctioneers.

Article 2.

Auction Sales of Articles Containing Hidden Value.

85-10. Application of article.

85-11. Sale of certain articles in violation of article prohibited.

85-12. Licensing of auction merchants.

Sec

85-13. Bond prerequisite for license.

85-14. Conduct of sales by licensed auctioneer required.

85-15. Regulation of bidding at sales.

85-16. Written description of articles purchased furnished to purchaser upon demand.

85-17. Application of Fair Trade Act.

85-18. Presence of merchant at sales required; responsibility for auctioneer's acts.

85-19. Statements in advertisements deemed representations; merchandise not as advertised.

85-20. False and fraudulent advertising, labelling, etc., prohibited.

85-21. False statements as to value or costs prohibited.

85-22. Application of article to agents.

85-23. Violation made misdemeanor.

85-24. Church and civic organizations not prevented from holding auctions.

85-25. Purpose of article.

85-26. Rights and privileges conferred by article are additional to rights, etc., under other laws.

ARTICLE 1.

In General.

§ 85-1. Application of article.—The provisions of this article shall apply only to sales of jewelry and silverware at public auction, and to the auctioneers conducting or engaged in such sales.

This article does not affect any sale of jewelry or silverware (1) by auction of jewelry or silverware made pursuant to and in execution of any order, decree, or judgment of the courts of the United States or of this State; or (2) made in consequence of any assignment of property and estate for benefit of creditors; or (3) made by executors, administrators, collectors, or guardians; or (4) made pursuant to any law touching the collection of any tax or duty, or sale of any wrecked goods. (R. C., c. 10, s. 6; Code, s. 2284; Rev., s. 220; C. S., s. 4999; 1923, c. 243, s. 1.)

Editor's Note.—The 1923 amendment restricted the application of this article.

§ 85-2. Appointment; bond. — No person shall exercise or conduct the trade or business of an auctioneer in this State or offer to conduct any such trade or business described in this article unless such person shall hold a license issued by the Commissioner of Revenue, and no license shall issue to any person who is not a resident of the State of North Carolina, and who has not been a bona fide resident for at least two years prior to the date when such application for license is filed with the Department of Revenue. The license shall issue only upon the filing of a bond in the sum of five thousand dollars (\$5,000.00), with such conditions and sureties as may be required and approved by the Commis-

sioner of Revenue. The license shall expire on the first day of April following, unless the authority is sooner revoked by the Commissioner of Revenue, and such authority shall be subject to revocation at any time by such officer for the causes and in the manner set forth in § 85-9. The fees for each license shall be two hundred dollars (\$200.00). (R. C., c. 10, s. 1; Code, s. 2281; 1889, c. 40; 1891, c. 576; Rev., s. 217; C. S., s. 5000; 1923, c. 243, s. 1; 1941, c. 131.)

Editor's Note.—The 1923 amendment made two years bona fide residence a prerequisite to application for a license. It also increased the amount of the bond required and the license fee, and inserted the provision relating to revocation. See 1 N. C. Law Rev. 302.

The 1941 amendment substituted the words "Commissioner of Revenue" for "Insurance Commissioner" and the words "De-

partment of Revenue" for "Insurance Department."

Liability of Surety on Bond.—Since it is the duty of an auctioneer to pay over to his employer the proceeds of sales made by him, sureties on his official bond, which is conditioned that he will do whatsoever the law requires, are liable to his employers for proceeds of sale which he withholds. Comm'rs v. Holloway, 10 N. C. 234 (1824).

- § 85-3. Requirements of law and of Commissioner of Revenue; false statement.—No person who shall conduct the business of an auctioneer in the State shall fail to comply with any provision of the law or any requirement of the Commissioner of Revenue pursuant to the law, and no such person shall make or cause to be made any false statement in any report required of him, and upon any violation of any section of this article, the Commissioner of Revenue may revoke his license to do business in this State. (1923, c. 243, s. 2; C. S., s. 5000(a); 1941, c. 131; c. 230, s. 2.)
- § 85-4. Punishment for violation of law.—Any person violating any of the provisions of this article shall be punished by a fine not exceeding two hundred dollars or by imprisonment in jail or worked on the roads for not exceeding two years, or by both such fine and imprisonment. (1923, c. 243, s. 3; C. S., s. 5000(b).)
- § 85-5. License tax by counties and municipalities.—Nothing in this article shall be construed to take away from the counties, cities or towns of this State any right or rights which they may now have, or may hereafter have, to levy a license tax on persons exercising or conducting the trade or business of an auctioneer. (1923, c. 243, s. 4; C. S., s. 5000(c).)
- § 85-6. Account semiannually; pay over moneys received .-- It is the duty of such auctioneers, on the first days respectively of October and April, to render to the clerks of the superior court of their respective counties a true and particular account in writing of all the moneys made liable to duty by law, for which any jewelry or silverware may have been sold at auction, and also at private sale, where the price of the jewelry and silverware sold at private sale was fixed or agreed upon or governed by any previous sale at auction of any jewelry and silverware of the same kind; which account shall contain a statement of the gross amount of sales by them made for each particular person or company at one time, the date of each sale, the names of the owners of the jewelry and silverware sold, and the amount of the tax due thereon, which tax they shall pay as directed by law. The statement shall be subscribed by them and sworn to before the clerk of the said court, who is hereby authorized to administer the oath. And it is their further duty to account with and pay to the person entitled thereto the moneys received on the sales by them made. (R. C., c. 10, s. 2; Code, s. 2282; Rev., s. 218; C. S., s. 5001.)
- § 85-7. Acting without appointment; penalty.—No person shall exercise the trade or business of an auctioneer by selling any jewelry or silverware by auction or by any other mode of sale whereby the best or highest bidder is deemed to be the purchaser, unless such person is appointed an auctioneer pur-

suant to this article, on pain of forfeiting to the State for every such sale the sum of two hundred dollars, which shall be prosecuted to recovery by the solicitor of the district. (R. C., c. 10, s. 5; Code, s. 2283; Rev., s. 219; C. S., s. 5002.)

- § 85-8. Commissions; one per cent to town.—Auctioneers are entitled to such compensation as may be agreed upon, not exceeding two and a half per cent on the amount of sales; and auctioneers of incorporated towns shall retain and pay one per cent of the gross amount of sales to the commissioners or other authority of their respective towns. (R. C., c. 10, s. 7; Code, s. 2285; Rev., s. 221; C. S., s. 5003.)
- § 85-9. Power of Commissioner of Revenue to revoke licenses of auctioneers.—The Commissioner of Revenue of the State of North Carolina shall have power to revoke an auctioneer's license, upon the conviction of the auctioneer by any court of competent jurisdiction of the State of North Carolina of any of the offenses hereinafter set out, or upon a finding by the Commissioner of Revenue that such auctioneer is guilty of any of the offenses hereinafter set out, to-wit: (1) fraud; (2) failing to account for or to remit any money or properties coming into his possession which belong to others; (3) forgery, embezzlement, obtaining money under false pretense, larceny, conspiracy to defraud, or like offense or offenses; (4) false representations as to the origin, genuineness, cost to seller, value, or other matters relating to the sale of any property then or thereafter to be offered for sale at auction; (5) conviction of any crime involving moral turpitude either in this State or any other state; (6) making any false statement in the application for license; (7) violating any of the provisions of the laws of this State relating to sales at auction. Provided, that no license shall be revoked upon a finding by the Commissioner of Revenue except by charges preferred. The accused shall be furnished a written copy of such charges and given not less than twenty days' notice of the time and place when the Commissioner shall accord a full and fair hearing on the charges. From any action of the Commissioner of Revenue depriving the accused of his license, the accused shall have the right of appeal to the superior court of the county of his residence, upon filing notice of appeal within ten days of the decision of the Commissioner of Revenue. The trial in the superior court shall be heard de novo as in the case of an appeal from a justice of the peace. (1941, c. 230, s. 1.)

ARTICLE 2.

Auction Sales of Articles Containing Hidden Value.

- § 85-10. Application of article.—The provisions of this article shall relate to all persons, firms and corporations who shall sell or offer to sell any of the goods, wares and merchandise hereinafter enumerated by means of auction sale of same conducted either by themselves or licensed auctioneers, except that it shall not apply to receivers, trustees in bankruptcy, trustees acting under a bona fide mortgage or deed of trust, trustees acting under the provisions of a will, any person acting under orders of any court, or to administrators or to executors while acting as such or to the bona fide holder of an article pledged to secure a debt. (1941, c. 371, s. 1.)
- § 85-11. Sale of certain articles in violation of article prohibited.—It shall be unlawful for any person, firm or corporation to offer for sale or sell to the highest bidder at an auction sale furs, objects of art, artware, glassware, silver plated ware, chinaware, gold, silver, precious or semiprecious stones, jewelry, watches, clocks, or gems of any kind, except as hereafter provided. (1941, c. 371, s. 2.)
- § 85-12. Licensing of auction merchants.—Before selling or offering for sale any of the articles hereinabove mentioned, the person, firm or corporation

which is to conduct such auction sale shall apply to and obtain from the Revenue Department of the State of North Carolina a license or permit to engage in the activity covered by this article and pay therefor to the Commissioner of Revenue the sum of two hundred dollars (\$200.00) for such license or permit. The license or permit issued by the Revenue Department shall entitle the person, firm or corporation named therein to conduct the auction sale as provided in this article in one county, and upon payment of one half of the fee for each additional county, such person, firm or corporation shall have authority to conduct auction sales in additional counties for which the tax has been paid. No person or copartnership shall receive any license or permit to conduct any such sale unless such person or a member of the copartnership is and has been for a period of one year prior to the issuance of the permit a resident of the State of North Carolina and is and has been for a period of six months prior thereto a resident of one of the counties for which he seeks permit, and no corporation shall receive a license or permit to conduct such sale unless such corporation is either a domestic corporation of the State of North Carolina or a foreign corporation which has complied with all requirements of the State of North Carolina and domesticated in North Carolina. (1941, c. 371, s. 3.)

- § 85-13. Bond prerequisite for license.—Before any person, firm or corporation shall offer for sale or sell at public auction any of the goods hereinabove described, such person, firm or corporation shall obtain the permit provided in § 85-12 and shall file with the Commissioner of Revenue a good and sufficient bond in the penal sum of five thousand dollars (\$5,000.00), executed by a corporate surety licensed to do business in North Carolina or by two individual sureties who own real property in the State of North Carolina of a net value of twice the amount of such bond and who shall have justified on such bond before the clerk of the superior court of the county in which such individual sureties reside. Said bond shall be kept in full force and effect during the period for which such license is issued and for a period of one year thereafter. The conditions of said bond are to provide that the surety or sureties are irrevocably appointed as process agents on whom any process issued against the person, firm or corporation conducting such sale may be served, and shall further provide that the person, firm or corporation conducting said sale will pay all valid judgments secured against such person, firm or corporation on causes of action arising out of such sales by auction. (1941, c. 371, s. 4.)
- § 85-14. Conduct of sales by licensed auctioneer required. An auctioneer duly licensed as such by the State of North Carolina shall be present and in charge of any such auction sale. (1941, c. 371, s. 5.)
- § 85-15. Regulation of bidding at sales.—At any such auction sale, no person interested either directly or indirectly as seller, and no person employed by any person interested either directly or indirectly as seller, shall bid on any articles offered for sale, and no person shall act as a fictitious bidder, or what is commonly known as a "capper," "booster," "by-bidder" or "shiller," and no person shall bid or offer to bid or pretend to buy an article sold or offered for sale at any such auction by prearranged agreement with any person interested in the sale directly or indirectly as seller. (1941, c. 371, s. 6.)
- § 85-16. Written description of articles purchased furnished to purchaser upon demand. At any such auction sale any person who shall purchase any article may have the right to demand of the person, firm or corporation conducting such sale, at the time the sale is made or within forty-eight hours thereafter, a written description of the merchandise so purchased, which description shall be accurate and full, and shall give the name of the manufacturer or producer of such merchandise, if known; shall state whether the merchandise is an original, a copy, a reproduction, new or used, genuine or artificial, and shall

also incorporate all representations made to induce persons to bid on such merchandise; such statement shall be deemed to be the representations upon which the merchandise is purchased, and upon a refusal to give such statement as herein provided, the sale may, at the option of the purchaser, be rescinded, in which event the purchaser shall have the privilege of demanding a return of all sums paid on account of such purchase. A notice of the right of a purchaser to demand such a statement shall be conspicuously displayed in each room where such auction shall take place. (1941, c. 371, s. 7.)

- § 85-17. Application of Fair Trade Act.—No sale shall be made at such auction sales which shall violate the provisions of the North Carolina Fair Trade Act. (1941, c. 371, s. 8.)
- § 85-18. Presence of merchant at sales required; responsibility for auctioneer's acts.—At all sales by auction conducted under the provisions of this article, the person, firm or corporation conducting such sale shall be present at all times in person or by an agent duly authorized in writing to represent such person, firm or corporation, and the person, firm or corporation conducting such sale shall be responsible for acts done and words spoken by the auctioneer or his assistants in furthering the sales by auction. (1941, c. 371, s. 9.)
- § 85-19. Statements in advertisements deemed representations; merchandise not as advertised.—At all such auction sales, all statements contained in the advertising of such sales shall be considered and deemed representations inducing purchasers to bid on and buy the merchandise advertised, and in the event any such merchandise shall not be as advertised, the purchaser thereof shall, at his option, be entitled to rescind such sale and have the right, upon such rescission, to demand and receive any sums paid by him on account of such purchase. (1941, c. 371, s. 10.)
- § 85-20. False and fraudulent advertising, labelling, etc., prohibited.—No person, firm or corporation conducting any such sale shall advertise any merchandise falsely or fraudulently, either by word of mouth, written or published advertisement, or other forms of advertisement, nor shall any such person, firm or corporation permit any article to be displayed or offered for sale which shall be falsely tagged, labeled or branded. (1941, c. 371, s. 11.)
- § 85-21. False statements as to value or costs prohibited.—No person, firm or corporation conducting any such sale shall allow or permit any false statement to be made by any person connected with such sale, either directly or indirectly, as seller, as to the value of any such merchandise being sold or as to the cost to the seller of any such merchandise being sold. (1941, c. 371, s. 12.)
- § 85-22. Application of article to agents.—The provisions of this article shall apply to the person, firm or corporation conducting such sale, whether such person, firm or corporation is the owner of the merchandise being sold, or selling such merchandise for others. (1941, c. 371, s. 13.)
- § 85-23. Violation made misdemeanor.—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than twenty-five (\$25.00) dollars nor more than five hundred (\$500.00) dollars, or imprisoned for not more than six months, or both, in the discretion of the court, and shall be permanently enjoined from thereafter participating in the conducting of any such auction sale, either directly or indirectly. (1941, c. 371, s. 14.)
- § 85-24. Church and civic organizations not prevented from holding auctions.—Nothing in this article shall be construed as preventing church and

civic organizations from holding auction sales of antiques for charitable purposes. (1941, c. 371, s. 15.)

- § 85-25. Purpose of article.—It is the purpose of this article to provide for the protection of the public in purchasing articles containing a hidden value, which is not and cannot be determined except by persons having special knowledge thereof, when such articles are sold at public auction, where there is not ample time for deliberation and appraisal of such merchandise, and where the purchaser, by reason of the manner of sale, of necessity must rely principally upon the representations made by the seller as to value of said merchandise. (1941, c. 371, s. 18.)
- § 85-26. Rights and privileges conferred by article are additional to rights, etc., under other laws.—The rights and privileges herein granted to any purchaser shall be in addition to all other rights, privileges or remedies which such purchaser might otherwise have under the laws of North Carolina, and the provisions of this article shall not be deemed to deprive any such purchaser of any rights or remedies which he otherwise would have had. (1941. c. 371, s. 19.)

Chapter 86.

Barbers.

Sec.

86-1. Necessity for certificate of registration and shop or school permit.

86-2. What constitutes practice of barbering.

86-3. Qualifications for issuance of certificates of registration.

86-4. Registered apprentice must serve under registered barber and take examination before opening shop.

86-5. Period of apprenticeship; affidavit; qualifications for certificate as registered barber.

86-6. State Board of Barber Examiners; appointment and qualifications; Governor; term of office and removal.

86-7. Office; seal; officers and secretary; bond.

86-8. Salary and expenses; employees; audit; annual report to Governor.

86-9. Application for examination; payment of fee.

86-10. Board to conduct examinations not less than four times each year.

86-11. Issuance of certificates of registra-

Sec.

86-11.1. Issuance of certificates of registration, without examination, to certain war veterans.

86-12. Barbers from other states; temporary permits; graduates of out-of-State barber schools.

86-13. Procedure for registration.

86-14. Procedure for registration of barbers not registered under § 86-13.

86-15. Fees.

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86-21. Notice; public hearing; appeal.

86-22. Misdemeanors.

86-23. Board to keep record of proceedings; data on registrants.

86-24. Barbering among members of same family.

86-25. Licensing and regulating barber schools and colleges.

§ 86-1. Necessity for certificate of registration and shop or school permit. — No person or combination of persons shall, either directly or indirectly, practice or attempt to practice barbering as hereinafter defined in the State of North Carolina without a certificate of registration either as a registered apprentice or as a registered barber issued pursuant to the provisions of this chapter by the State Board of Barber Examiners hereinafter established. No person, or combination of persons, or corporation, shall operate, manage, or attempt to manage or operate a barber school, barber shop, or any other place where barber service is rendered, after July first, one thousand nine hundred and forty-five, without a shop permit, or school permit, issued by the State Board of Barber Examiners, pursuant to the provisions of this chapter. (1929, c. 119, s. 1; 1941, c. 375, s. 1; 1945, c. 830, s. 1.)

Editor's Note. — The 1941 amendment struck out the words "for pay" formerly appearing after the word "shall" in line one. And the 1945 amendment added the second sentence.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 447.

Constitutionality.—This chapter, known as the "Barber's Act," relates to the public health and is constitutional as a valid exercise of the police power of the State. State v. Lockey, 198 N. C. 551, 152 S. E. 693 (1930).

Validity of Chapter Is No Longer Open to Attack.—The validity of this chapter,

providing for the licensing of barbers and the control and regulation of the trade, having been judicially determined, it may not be attacked in a subsequent suit. Motley v. State Board of Barber Examiners. 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947).

Application.—The provisions of this chapter apply to proprietor barbers, as in this case the owner and operator of a one-chair barber shop. State v. Lockey, 198 N. C. 551, 152 S. E. 693 (1930).

Cited in James v. Denny, 214 N. C. 470,

199 S. E. 617 (1938).

§ 86-2. What constitutes practice of barbering. — Any one or com-

bination of the following practices shall constitute the practice of barbering in the purview of this chapter:

(a) Shaving or trimming the beard, or cutting the hair.

(b) Giving facial or scalp massages, or treatments with oils, creams, lotions and other preparations either by hand or mechanical appliances.

(c) Singeing, shampooing or dyeing the hair or applying hair tonics.

(d) Applying cosmetic preparations, antiseptics, powders, oils, clays and lotions to the scalp, neck or face. (1929, c. 119, s. 2; 1941, c. 375, s. 2.)

Editor's Note. — The 1941 amendment formerly appearing after the word "pracstruck out the words "when done for pay" tices" near the beginning of the section.

§ 86-3. Qualifications for issuance of certificates of registration.

—No person shall be issued a certificate of registration as a registered apprentice by the State Board of Barber Examiners, hereinafter established:

(a) Unless such person is at least seventeen years of age.

(b) Unless such person passes a satisfactory physical examination prescribed by said Board of Barber Examiners.

(c) Unless each person has completed at least a six months' course in a reliable

barber school or college approved by said Board of Barber Examiners.

- (d) Unless such person passes the examination prescribed by the Board of Barber Examiners and pays the required fees hereinafter enumerated. (1929, c. 119, s. 3.)
- § 86-4. Registered apprentice must serve under registered barber and take examination before opening shop.—No registered apprentice, registered under the provisions of this chapter, shall operate a barber shop in the State, but must serve his period of apprenticeship under the direct supervision of a registered barber, as required by § 86-5.

Every registered apprentice when eligible shall take the examination to receive a certificate of registration as a registered barber. No registered apprentice shall be permitted to practice for a period of more than three years without passing the required examination to receive a certificate of registration as a registered barber.

(1929, c. 119, s. 4; 1941, c. 375, s. 3.) Editor's Note.—The 1941 amendment

added the second paragraph.

- § 86-5. Period of apprenticeship; affidavit; qualifications for certificate as registered barber.—Any person to practice barbering as a registered barber, must have worked as a registered apprentice for a period of at least eighteen months under the direct supervision of a registered barber, and this fact must be demonstrated to the Board of Barber Examiners by the sworn affidavit of three registered barbers, or such other methods of proof as the Board may prescribe and deem necessary. A certificate of registration as a registered barber shall be issued by the Board hereinafter designated, to any person who is qualified under the provisions of this chapter, or meets the following qualifications:
 - (a) Who is qualified under the provisions of § 86-3;

(b) Who is at least nineteen years of age;

- (c) Who passes a satisfactory physical examination as prescribed by said Board;
- (d) Who has practiced as a registered apprentice for a period of eighteen months, under the immediate personal supervision of a registered barber; and
- (e) Who has passed a satisfactory examination, conducted by the Board, to determine his fitness to practice barbering, such examination to be so prepared and conducted, as to determine whether or not the applicant is possessed of the requisite skill in such trade, to properly perform all the duties thereof, including the ability of the applicant in his preparation of tools, shaving, haircutting, and all the duties and services incident thereto, and has sufficient knowledge concerning dis-

eases of the face, skin and scalp, to avoid the aggravation and spreading thereof in the practice of said trade. (1929, c. 119, s. 5.)

- § 86-6. State Board of Barber Examiners; appointment and qualifications; Governor; term of office and removal.—A board to be known as the State Board of Barber Examiners is hereby established to consist of three members appointed by the Governor of the State. Each member shall be an experienced barber, who has followed the practice of barbering for at least five years in the State. The members of the first Board appointed shall serve for six years, four years and two years, respectively, after appointed, and members appointed thereafter shall serve for six years. The Governor, at his option, may remove any member for good cause shown and appoint members to fill unexpired terms. (1929, c. 119, s. 6.)
- § 86-7. Office; seal; officers and secretary; bond. The Board shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. Said Board shall elect its own officers, and in addition thereto, shall elect a full-time secretary, which secretary shall receive an annual salary not to exceed thirty-six hundred dollars (\$3600.00), such salary as well as all other expenses of said Board, to be paid only out of the revenue derived from fees collected under the provisions of this chapter. Said full-time secretary, before entering upon the duties of his office, shall execute to the State of North Carolina a satisfactory bond with a duly licensed bonding company in this State as surety or other acceptable surety, such bond to be in the penal sum of not less than ten thousand dollars (\$10,000.00) and conditioned upon the faithful performance of the duties of his office and the true and correct accounting of all funds received by him. Said full-time secretary shall turn over to the State Treasurer to be credited to the State Board of Barber Examiners all funds collected or received by him under this chapter, such funds to be held and expended under the supervision of the Director of the Budget, exclusively for the enforcement and administration of the provisions of this chapter, subject to the limitations hereof. Provided, however, that nothing herein shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from fees collected under the provisions of this chapter and received by the said State Treasurer in the manner aforesaid. (1929, c. 119, s. 7; 1941, c. 375, s. 4; 1943, c. 53, s. 1; 1945, c.

Editor's Note.— The 1943 amendment rewrote the provisions relating to the secretary, thereby omitting the sentence added by the 1941 amendment which provided that the Board should employ such agents, assistants, and attorneys as it might deem necessary. The 1945 amendment increased the annual salary of the secretary from three thousand to thirty-six hundred dollars.

§ 86-8. Salary and expenses; employees; audit; annual report to Governor.—Each member of the Board of Barber Examiners shall receive for his services an annual salary of thirty-six hundred dollars (\$3600.00) payable in equal monthly installments, and shall be reimbursed for his actual expenses, and shall receive not less than five cents (5c) per mile for the distance traveled in performance of his duties, which said salary and expense and all other salaries and expenses in connection with the administration of this chapter, shall be paid upon warrant drawn on the State Treasurer, solely from the funds derived from the fees collected and received under this chapter. The Board shall employ such agents, assistants and attorneys as it may deem necessary. Each member of the Board of Barber Examiners, and each of its agents and assistants who collect any moneys or fees in the discharge of their duties, shall execute to the State of North Carolina a bond in the sum of one thousand dollars (\$1,000.00) conditioned upon the faithful performance of his duties of office, and the true accounting for all funds collected. There shall be annually made by the State Auditing Department, a complete audit and examination of the receipts and disbursements, and the State

Board of Barber Examiners shall report annually to the Governor, a full statement of its receipts and expenditures, and also a full statement of its work during the year, together with such recommendations as it may deem expedient. (1929, c. 119, s. 8; 1943, c. 53, s. 2; 1945, c. 830, s. 3.)

Editor's Note. - The 1943 amendment three thousand to thirty-six hundred dolrewrote this section, and the 1945 amendlars. ment increased the annual salary from

§ 86-9. Application for examination; payment of fee.—Each applicant for an examination shall:

(a) Make application to the Board on blank forms prepared and furnished by the full-time secretary, such application to contain proof under the applicant's oath of the particular qualifications of the applicant.

(b) Pay to the Board the required fee.

All applications for said examination must be filed with the full-time secretary at least thirty days prior to the actual taking of such examination by applicants. (1929, c. 119, s. 9.)

Cross Reference.—As to fees generally, see § 86-15 and note.

- § 86-10. Board to conduct examinations not less than four times each year.—The Board shall conduct examinations of applicants for certificates of registration to practice as registered barbers, and of applicants for certificate of registration to practice as registered apprentices, not less than four times each year, at such times and places as will prove most convenient, and as the Board may determine. The examination of applicants for certificates of registration as registered barbers and registered apprentices shall include such practical demonstration and oral and written tests as the Board may determine. (1929, c. 119, s. 10.)
- § 86-11. Issuance of certificates of registration. Whenever the provisions of this chapter have been complied with, the Board shall issue, or have issued, a certificate of registration as a registered barber or as a registered apprentice, as the case may be. (1929, c. 119, s. 11.)
- § 86-11.1. Issuance of certificates of registration, without examination, to certain war veterans. — The Board shall issue to honorably discharged veterans of World War I or II, who are bona fide residents of North Carolina for at least six months, upon application, certificates of registration to practice barbering by any such veteran without requiring him to take the examination provided for in this chapter. The application shall be accompanied by a certified or photostatic copy of the honorable discharge of such applicant from the armed forces, an affidavit by such veteran that he or she has practiced barbering for a period of three or more years, either in or out of the service, and that he or she was a resident of North Carolina immediately prior to entering the United States armed forces, accompanied by supporting affidavits of two or more unrelated individuals, and a certificate from a physician licensed to practice medicine in this State to the effect that applicant is of good health and is free from any communicable or contagious disease.

The application, honorable discharge, affidavit and health certificate accompanied by the fees prescribed in this chapter shall be the sole requirement for the issuance to such veterans of a certificate of registration as a registered barber pro-

vided for in this chapter. (1947, c. 941.)

Cross Reference.—See Const., Art. I, §§ 1, 7, 17, and notes.

War I or World War II, who have classification and are valid. Motley v. State

practiced barbering for three or more years prior to application, are eligible for license Section Is Constitutional.—The provisions of this section, that veterans of World by the general law, prescribe a reasonable Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947).

Licensed barbers in their individual capacity may not challenge the constitutionality of this section, by a suit for an injunction upon the ground that the granting of licenses to returned veterans under the provisions of the statute would tend to lower the standards or destroy the security of the trade, since there is no allegation of specific injury to personal or property right sufficient to invoke equitable jurisdiction. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947).

Licensed barbers may not attack the constitutionality of this section by suit for injunction on the ground that the granting of licenses to returned veterans under the provisions of this section would result in unlawful competition which would diminish their income from the trade, or even amount to its confiscation, since if the section is unconstitutional there is adequate remedy by prosecution of interlopers. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947).

Suit Determined on Its Merits.—A suit by an experienced barber who had applied for and was refused a license for failure to pass the examination of the Board of Barber Examiners, to enjoin the Board from issuing licenses to returned veterans without an examination under the provisions of this section, was determined upon its merits. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947).

§ 86-12. Barbers from other states; temporary permits; graduates of out-of-State barber schools.—Persons who have practiced barbering in another state or country for a period of not less than two years, and who move into this State, shall prove and demonstrate their fitness to the Board of Barber Examiners, as herein created, before they will be issued a certificate of registration to practice barbering, but said Board may issue such temporary permits as are necessary.

Any person who has graduated from a barber school in any other state having substantially the same standards as are required of barber schools in this State and who is otherwise qualified as required by this chapter, shall be allowed, upon making the application and paying the fee required by this chapter, to take the examination for a certificate of registration as a registered barber or as a registered apprentice, as the case may be. And the State Board of Barber Examiners shall issue a proper certificate to each such person who passes such examination. When any such person makes application for permission to take an examination, it shall be the duty of the State Board of Barber Examiners to ascertain and determine whether the barber school from which such person has graduated has substantially the same standards as are required of barber schools in this State. (1929, c. 119, s. 12; 1941, c. 375, s. 5; 1947, c. 1024.)

Editor's Note.—The 1941 amendment inserted the words "for a period of not less than two years" in the first paragraph, and the 1947 amendment added the second paragraph.

The word "country" in line two of this section is in accordance with the original enactment in 1929. Through error the word was brought forward in the General Statutes in 1943 as "county."

§ 86-13. Procedure for registration. — The procedure for the registration of present practitioners of barbering shall be as follows:

(a) If such person has been practicing barbering for a shorter period of time than eighteen months, he shall, upon paying the required fee, and making an affidavit to that effect to the Board of Barber Examiners, be issued a certificate of registration as an apprentice.

(b) If such person has been practicing barbering in the State of North Carolina for more than eighteen months, he shall upon paying the required fee and making an affidavit to that effect, to the Board of Barber Examiners, be issued a

certificate of registration as a registered barber.

(c) All persons, however, who are not actively engaged in the practice of barbering, at the time this chapter is enacted into law, shall be required to take the examination herein provided, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering. (1929, c. 119, s. 13.)

- § 86-14. Procedure for registration of barbers not registered under § 86-13.—The procedure for the registration of present practitioners of barbering who were not registered under § 86-13, shall be as follows:
- (a) If such person has been practicing barbering in the State of North Carolina for more than eighteen months and is actively engaged in the practice of barbering at the time this bill is enacted into law, he shall, upon making affidavit to that effect and paying the required fee to the Board of Barber Examiners, be issued a certificate of registration as a registered barber.
- (b) All persons, however, who do not make application prior to January 1, 1938, shall be required to take the examination prescribed by the State Board of Barber Examiners, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering. (1937, c. 138, s. 3.)
- § 86-15. Fees.—'The fee to be paid by applicant for examination to determine his fitness to receive a certificate of registration, as a registered apprentice, shall be five dollars (\$5.00), and such fee must accompany his application. The annual license fee of an apprentice shall be three dollars (\$3.00). The fee to be paid by an applicant for an examination to determine his fitness to receive a certificate of registration as a registered barber shall be fifteen dollars (\$15.00), and such fee must accompany his application. The annual license fee of a registered barber shall be five dollars (\$5.00). All licenses, both for apprentices and for registered barbers, shall be renewed as of the thirtieth day of June of each and every year, and such renewals for apprentices shall be three dollars (\$3.00), and for registered barbers five dollars (\$5.00). The fee for restoration of an expired certificate for registered barbers shall be seven dollars (\$7.00), and restoration of expired certificate of an apprentice shall be four dollars (\$4.00). The fee to be paid for all barber shop permits, established, and under the inspection of the State Board of Barber Examiners as of July first, one thousand nine hundred and fortyfive, shall be two dollars (\$2.00), and the initial fee to be paid by barber shops thereafter established, shall be five dollars (\$5.00) for the first year, or portion thereof, and the annual renewal fee for each barber shop permit shall be two dollars (\$2.00). The fee to be paid for barber school permits operating on, or before July first, one thousand nine hundred and forty-five, shall be twenty-five dollars (\$25.00). The initial fee to be paid by each barber school thereafter established, shall be fifty dollars (\$50.00), and the annual renewal fee for each barber school permit shall be twenty-five dollars (\$25.00). Each barber shop permit and each barber school permit shall be renewed as of the thirtieth day of June, each and every year, and shall not be transferable from one person to another, and such barber shop and barber school permit shall be conspicuously posted within each shop or school, or any place or establishment: Provided, further, that all fees received under this chapter shall be used exclusively for the enforcement of this chapter as provided by law. (1929, c. 119, s. 14; 1937, c. 138, s. 4; 1945, c. 830, s. 4.)

Editor's Note.—The 1937 amendment increased the fees charged under this section, and the 1945 amendment rewrote the latter half of this section.

Purpose of Fees — Constitutionality.— The fees prescribed are for the expenses of enforcing the chapter, which is necessary to the public health and welfare. They are not imposed for revenue, and the payment of the barber's license tax under the Revenue Act does not affect the obligation to pay the fees prescribed by this chapter, and assessment of the fees thereunder is constitutional. State v. Lockey, 198 N. C. 551, 152 S. E. 693 (1930).

§ 86-16. Persons exempt from provisions of chapter.—The following persons are exempt from the provisions of this chapter while engaged in the proper discharge of their professional duties:

(a) Persons authorized under the laws of the State to practice medicine and

surgery.

(b) Commissioned medical or surgical officers of the United States Army, Navy, or Marine Hospital Service.

(c) Registered nurses.

(d) Students in schools, colleges and universities, who follow the practice of barbering upon the school, college, or university premises, for the purpose of making a part of their school expenses.

(e) Undertakers.

(f) Persons practicing hairdressing and beauty culture exclusively for females. The provisions of this chapter shall apply to all persons except those persons specifically exempted by this section and § 86-24. (1929, c. 119, s. 15; 1937, c. 138, s. 2; 1941, c. 375, s. 6.)

Editor's Note.—The 1941 amendment words "in hairdressing and beauty shops substituted the words "exclusively for females" in subsection (f) for the former

- § 86-17. Sanitary rules and regulations; inspection.—(a) Each barber and each owner or manager of a barber shop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:
- 1. Inspection.—All barber shops, or barber schools and colleges, or any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board of Barber Examiners, or its agents or assistants.
- 2. Proper Quarters.—Every barber shop, or any other place where barber service is rendered, shall be located in buildings or rooms of such construction that the same may be easily cleaned.
- 3. Barber Shops.—Every barber shop, or barber school, or barber college, or any other place where barber service is rendered, shall be well-lighted, well-ventilated, and kept in a clean, orderly and sanitary condition.
- 4. Position of Barber Shops.—Any room or place for barbering is prohibited which is used for other purposes, unless such a substantial partition or wall of ceiling height, separates such portion used for barber shops, or any place where barber service is rendered. However, this rule shall apply to sanitation only as determined by the discretion of the inspector.

5. Walls and Floors.—The floors, walls, and ceiling of all barber shops, or barber schools and colleges, or any other place where barber service is rendered,

must be kept clean and sanitary at all times.

6. Fixture Conditions.—Work stands or cabinets, and chairs and fixtures of all barber shops, or any other place where barber service is rendered, must be kept clean and sanitary at all times. All lavatories, towel urns, paper jars, cuspidors, and all receptacles containing cosmetics of any nature must be kept clean at all times.

7. Tools and Instruments.—Every owner or manager of each barber shop shall supply a separate tool cabinet, having a door as near airtight as possible, for himself and each barber employed. All tools and instruments shall be kept clean and sanitary at all times and shall be kept in tool cabinets, and shall not be placed in drawers or on work stands. Cabinets shall be of such construction as to be easily cleaned and shall be clean and sanitary at all times.

8. Water.—(1) All barber shops, or any other place where barber service is rendered, located in towns or cities having a water system shall be required to connect with said water system. Running water, hot and cold, shall be provided,

and lavatories shall be located at a convenient place in each barber shop.

9. Water.—(2) All barber shops or any other place where barber service is rendered, not located in cities or towns having water systems must supply hot and cold water under pressure in tank to hold not less than five gallons, and said tanks must be connected with a lavatory. Tanks and lavatory shall be of such construction that they may be easily cleaned. Said lavatory must have a drain pipe to

drain all waste water out of the building. The dipping of shaving mugs and towels, etc., into water receptacles is prohibited.

10. Styptic Pencil and Alum.—No person serving as a barber shall, to stop the flow of blood, use alum or other material unless the same be used in liquid or powder form with clean towels. The use of common styptic pencil or lump

alum shall not be permitted for any purpose.

11. Instruments.—Each person serving as a barber, shall, immediately before using razors, tweezers, combs, contact cup or pad of vibrator or massage machine, sterilize same by immersing in a solution of fifty per cent (50%) alcohol, five per cent (5%) carbolic acid, twenty per cent (20%) formaldehyde, or ten per cent (10%) lysol. Every owner or manager of each barber shop shall supply a separate container for each barber adequate to provide for a sufficient supply of the above solutions.

12. Hair Brushes and Combs.—Each barber shall maintain combs and hair brushes in clean and sanitary manner at all times, and each hair brush shall be

thoroughly washed with hot water and soap before each separate use.

13. Mugs and Brushes.—Each barber shall thoroughly clean mug and lather brush before each separate use and same must be kept clean and sanitary at all

14. Headrest.—The headrest of every barber chair shall be protected with fresh,

clean paper or clean laundered towel before its use for any person.

- 15. Towels.—Each and every person serving as a barber shall use a clean freshly laundered towel for each patron. This applies to every kind of towel, dry towel, steam towel, or washcloth. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed, shall be provided to receive used towels and all used towels must be discarded in said receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed or washed in the barber shop. All wet and used towels must be removed from the work stand or lavatory after serving each patron.
- 16. Haircloths.—Whenever a haircloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neck strap shall be placed around the neck so as to prevent the haircloth from touching the skin. Haircloths shall be discarded when soiled.
- 17. Baths and Toilets.—Baths and toilets must be kept in a clean and sanitary manner at all times.
- 18. Barber Hands.—Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each customer.

19. Barber Appearance.—Each person working as a barber shall be clean, both

as to person and dress.

- 20. Health Certificate.—No person having an infectious or communicable disease shall practice as a barber in the State of North Carolina. Each and every barber practicing the profession in North Carolina shall furnish the State Board of Barber Examiners a satisfactory health certificate, including Wassermann Test, at such times as the Board of Barber Examiners may deem necessary, signed by a physician in good standing and licensed by the North Carolina Board of Medical
- 21. Diseases.—No barber shall serve any person having an infectious or communicable disease, and no barber shall undertake to treat any infectious or conta-

22. Rules Posted.—The owner or manager of any barber shop, or any other place where barber service is rendered, shall post a copy of these rules and regula-

tions in a conspicuous place in said shop.

(b) Any member of the Board and its agents and assistants shall have authority to enter upon and inspect any barber shop or barber school, or other place where barber service is rendered, at any time during business hours in performance of the duties conferred and imposed by this chapter. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barber shop or barber school, or any other place where barber service is rendered in the State, and such copy shall be posted in a conspicuous place in each barber shop or barber school. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7.)

Editor's Note. — The 1941 amendment rewrote this section.

- § 86-18. Certificates to be displayed.—Every holder of a certificate of registration shall display it in a conspicuous place adjacent to or near his work chair. (1929, c. 119, s. 17.)
- § 86-19. Renewal or restoration of certificates.—Every registered barber and every registered apprentice who continues in practice or service shall annually, on or before June thirtieth of each year, renew his certificate of registration and furnish such health certificate as the Board may prescribe and pay the required fee. Every certificate of registration shall expire on the thirtieth day of June in each and every year. A registered barber or a registered apprentice whose certificate of registration has expired may have his certificate restored immediately upon paying the required restoration fee and furnishing health certificate prescribed by the Board: Provided, however, that registered barber or registered apprentice whose certificate has expired for a period of three years shall be required to take the examination prescribed by the State Board of Barber Examiners, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering.

All persons serving in the United States armed forces or any persons whose certificates of registration as a registered barber, or registered apprentice, were in force one year prior to entering service, or one year prior to the beginning of war, may, without taking the required examination, renew said certificate within three years after receiving an honorable discharge, any other persons three years after the end of war, by paying the current annual license fee and furnishing the State Board of Barber Examiners with a satisfactory health certificate. (1929,

c. 119, s. 18; 1937, c. 138, s. 5; 1945, c. 830, s. 5.)

Editor's Note. - The 1937 amendment And the 1945 amendment added the second added the provisions as to furnishing paragraph. health certificate and taking examination.

- § 86-20. Disqualifications for certificate. The Board may either refuse to issue or renew, or may suspend or revoke, any certificate of registration, or barber shop permit, or barber school permit for any one or combination of the following causes:
- 1. Conviction of a felony shown by certified copy of the record of the court of conviction.

2. Gross malpractice or gross incompetency.

3. Continued practice by a person knowingly having an infectious or conta-

4. Advertising by means of knowingly false or deceptive statements.

5. Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit-forming drugs.

6. The commission of any of the offenses described in § 86-22, subdivisions

three, four and six.

- 7. The violation of any one or a combination of the sanitary rules and regulations.
- 8. The violation of any of the provisions of §§ 86-4 and 86-15. (1929, c. 119, s. 19; 1941, c. 375, s. 8; 1945, c. 830, s. 6.)

Editor's Note. - The 1941 amendment mit or barber school permit." The amendadded subsections 7 and 8. The 1945 amendment inserted in the preliminary paragraph the words "or barber shop per-

ment also added the reference to § 86-15 in subsection 8.

§ 86-21. Notice; public hearing; appeal.—The Board may neither refuse to issue nor refuse to renew, nor suspend, or revoke any certificate of registration, barber shop permits, or barber school permits, however, for any of these causes, unless the person accused has been given at least thirty days' notice in writing of the charge against him and a public hearing by the Board.

Upon the hearing of any such proceeding, the Board may administer oaths and may procure by its subpoena, the attendance of witnesses and the production of

relevant books and papers.

\$ 86-21

Any barber in the State whose case has been passed upon by the Board of Barber Examiners shall have the right and is hereby given the right to appeal to the superior court of the State, which court may in its discretion reverse or modify any order made by the said Board of Barber Examiners if it appears to the court that the law was not followed in said action. (1929, c. 119, s. 20; 1939, c. 218, s. 1; 1945, c. 830, s. 7.)

Cross Reference.—For uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note. — The 1945 amendment inserted in the first paragraph the words

"barber shop permits, or barber school permits." It also added at the end of the section the words "if it appears to the court that the law was not followed in said action."

§ 86-22

§ 86-22. Misdemeanors. — Each of the following constitutes a misdemeanor, punishable upon conviction by a fine of not less than ten dollars, nor more than fifty (\$50.00) dollars, or thirty days in jail or both:

1. The violation of any of the provisions of § 86-1.

2. Permitting any person in one's employ, supervision or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice.

3. Permitting any person in one's employ, supervision or control, to practice

as a barber unless that person has a certificate as a registered barber.

4. Obtaining or attempting to obtain a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations.

5. Practicing or attempting to practice by fraudulent misrepresentations.

6. The willful failure to display a certificate of registration as required by

§ 86-18.

7. The violation of the reasonable rules and regulations adopted by the State Board of Barber Examiners for the sanitary management of barber shops and barber schools.

8. The violation of any of the provisions of § 86-5.

9. The refusal of any owner or manager to permit any member of the Board, its agents, or assistants to enter upon and inspect any barber shop, or barber school, or any other place where barber service is rendered, at any time during business hours.

10. The violation of any one or a combination of the sanitary rules and regu-

lations.

11. Practicing or attempting to practice barbering during the period of suspension or revocation of any certificate of registration granted under this chapter. Each day's operation during such period of suspension or revocation shall be deemed a separate offense, and, upon conviction thereof, shall be punished as prescribed in this section. (1929, c. 119, s. 21; 1933, c. 95, s. 1; 1937, c. 138, s. 6; 1941, c. 375, ss. 9, 10.)

Editor's Note.— The 1933 amendment substituted in subsection 7 the words "State Board of Barber Examiners" for "State Board of Health." The 1937 amendment inserted the words "or thirty days in jail or both" in the first paragraph, and struck

out the words "willful and continued" formerly appearing before the word "violation" in subsection 7. The 1941 amendment changed subsection 7 and added subsection 8.

- § 86-23. Board to keep record of proceedings; data on registrants.—The Board shall keep a record of its proceedings relating to the issuance, refusal, renewal, suspension, and revocation of certificates of registration. This record shall also contain the name, place of business and residence of each registered barber and registered apprentice, and the date and number of his certificate of registration. This record shall be open to public inspection at all reasonable times. (1929, c. 119, s. 22.)
- § 86-24. Barbering among members of same family.—This chapter shall not prevent a member of the family from practicing barbering on a member of his or her family. (1941, c. 375, s. 12.)
- § 86-25. Licensing and regulating barber schools and colleges.—The North Carolina State Board of Barber Examiners shall have the right to approve barber schools or colleges in the State, and to prescribe rules and regulations for their operation. However, no barber school or college shall be approved by the Board unless it meets all of the following provisions:
- (a) Provide a course of instruction of six months, or one thousand two hundred and forty-eight hours (1,248) for each student; attendance on each working day to consist of not less than eight hours.
- (b) Each instructor or teacher in any barber school or college must be the holder of an up-to-date certificate of registration as a registered barber in the State of North Carolina, and before being permitted to instruct or teach, shall pass an examination prescribed by the Board to determine his or her qualifications to instruct or teach. Such examination shall be based, among other things, on the provisions of subsection (c) of this section.
- (c) Each student enrolled shall be given a complete course of instruction on the following subjects: haircutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating of muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction in common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barber shops; instruction in the use of ultra-violet, infra-red lamps and other electrical appliances and the effects of the use of each on the human skin; structure of the skin and hair; structure of the head and cranium; muscles of the head, neck and face; glands of the skin and their various functions; cells, digestion; blood circulation; nerve points of the face.

(d) An application for student's permit and doctor's certification must be filed with the State Board of Barber Examiners for each student before entering school or college. Such application to be worded as prescribed by the State Board of Barber Examiners. No student shall be entitled to enroll without student's permit.

(e) A monthly report of each student enrolled shall be furnished the State Board of Barber Examiners on the first of each month. This report to be pre-

scribed by the State Board of Barber Examiners.

(f) All services rendered in schools or colleges on patrons must be done by students only. Instructors may be allowed to teach and aid the students in performing the various barber services, but they shall not be permitted to finish up the patrons after the student has completed work.

(g) After the student has completed six months, or one thousand two hundred and forty-eight (1,248) hours in school or college, he shall not be allowed to re-

main in the pay department to work on patrons.

(h) A sign must be displayed on front of the place of business designating that

it is a school or college.

(i) The Board of Barber Examiners shall have the right to withdraw the approval of any barber school or college for the violation of any of the provisions of this section. (1945, c. 830, s. 8.)

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Contractors.

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ARTICLE 1.

General Contractors.

§ 87-1. "General contractor" defined; exemptions.—For the purpose of this article, a "general contractor" is defined as one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building, highway, sewer main, grading or any improvement or structure where the cost of the undertaking is fifteen thousand dollars (\$15,000.00) or more and anyone who shall bid upon or engage in constructing any undertakings or improvements above mentioned in the State of North Carolina costing fifteen thousand dollars (\$15,000.00) or more shall be deemed and held to have engaged in the business of general contracting in the State of North Carolina.

This section shall not apply to persons or firms or corporations furnishing or erecting industrial equipment, power plant equipment, radial brick chimneys, and monuments. (1925, c. 318, s. 1; 1931, c. 62, s. 1; 1937, c. 429, s. 1; 1949,

c. 936.)

Editor's Note.— The 1937 amendment made this section applicable to bidding upon construction. The 1949 amendment rewrote the section, increasing the minimum

cost mentioned from ten thousand to fifteen thousand dollars and adding the second paragraph.

- § 87-2. Licensing Board; organization.—There shall be a State Licensing Board for Contractors consisting of five members who shall be appointed by the Governor within sixty days after March 10, 1925. one member of such Board shall have as a larger part of his business the construction of highways; at least one member of such Board shall have as the larger part of his business the construction of public utilities; at least one member shall have as the larger part of his business the construction of buildings. The members of the first Board shall be appointed for one, two, three, four and five years respectively, their terms of office expiring on the thirty-first day of December of the said years. Thereafter in each year the Governor in like manner shall appoint to fill the vacancy caused by the expiration of the term of office a member for a term of five years. Each member shall hold over after the expiration of his term until his successor shall be duly appointed and qualified. If vacancies shall occur in the Board for any cause the same shall be filled by the appointment of the Governor. The Governor may remove any member of the Board for misconduct, incompetency or neglect of duty. (1925, c. 318, s. 2.)
- § 87-3. Members of Board to take oath.—Each member of the Board shall, before entering upon the discharge of the duties of his office, take and file with the Secretary of State an oath in writing to properly perform the duties of his office as a member of said Board and to uphold the Constitution of North Carolina and the Constitution of the United States. (1925, c. 318, s. 3.)
- § 87-4. First meeting of Board; officers; secretary-treasurer and assistants.—The said Board shall, within thirty days after its appointment by the Governor, meet in the city of Raleigh, at a time and place to be designated

by the Governor, and organize by electing a chairman, a vice-chairman, and a secretary-treasurer, each to serve for one year. Said Board shall have power to make such bylaws, rules and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The secretary-treasurer shall give bond in such sum as the Board shall determine, with such security as shall be approved by the Board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands.

The secretary-treasurer need not be a member of the Board, and the Board is hereby authorized to employ a full-time secretary-treasurer, whose salary shall not exceed forty-eight hundred dollars (\$4800.00) per annum, and such other assistants and make such other expenditures as may be necessary to the proper carrying out of the provisions of this article. (1925, c. 318, s. 4; 1941, c. 257,

s. 4; 1947, c. 611.)

Editor's Note.—The 1941 amendment amendment increased the salary stated added the last sentence, and the 1947 therein from \$3600 to \$4800.

- § 87-5. Seal of Board.—The Board shall adopt a seal for its own use. The seal shall have the words "Licensing Board for Contractors, State of North Carolina," and the secretary shall have charge, care and custody thereof. (1925, c. 318, s. 5.)
- § 87-6. Meetings; notice; quorum.—The Board shall meet twice each year, once in April and once in October, for the purpose of transacting such business as may properly come before it. At the April meeting in each year the Board shall elect officers. Special meetings may be held at such times as the Board may provide in the bylaws it shall adopt. Due notice of each meeting and the time and place thereof shall be given to each member in such manner as the bylaws may provide. Three members of the Board shall constitute a quorum. (1925, c. 318, s. 6.)
- § 87-7. Records of Board; disposition of funds.—The secretary-treasurer shall keep a record of the proceedings of the said Board and shall receive and account for all moneys derived from the operation of this article. Any funds remaining in the hands of the secretary-treasurer to the credit of the Board after the expenses of the Board for the current year have been paid shall be paid over to the Greater University of North Carolina for the use of its engineering department. The Board has the right, however, to retain at least ten per cent of the total expense it incurs for a year's operation to meet any emergency that may arise. (1925, c. 318, s. 7.)
- § 87-8. Records; roster of licensed contractors. The secretary-treasurer shall keep a record of the proceedings of the Board and a register of all applicants for license showing for each the date of application, name, qualifications, place of business, place of residence, and whether license was granted or refused. The books and register of this Board shall be prima facie evidence of all matters recorded therein. A roster showing the names and places of business and of residence of all licensed general contractors shall be prepared by the secretary of the Board during the month of January of each year; such roster shall be printed by the Board out of funds of said Board as provided in § 87-7. On or before the first day of March of each year the Board shall submit to the Governor a report of its transactions for the preceding year, and shall file with the Secretary of State a copy of such report, together with a complete statement of the receipts and expenditures of the Board, attested by the affidavits of the chairman and the secretary, and a copy of the said roster of licensed general contractors. (1925, c. 318, s. 8; 1937, c. 429, s. 2.)

Editor's Note.—The 1937 amendment roster of contractors to the clerks of cities, eliminated the requirement for mailing towns and counties.

- § 87-9. Compliance with Federal Highway Act, etc.; contracts financed by federal road funds.—Nothing in this article shall operate to prevent the State Highway and Public Works Commission from complying with any act of Congress and any rules and regulations promulgated by the United States Secretary of Agriculture for carrying out the provisions of the Federal Highway Act, or shall apply to any person, firm or corporation proposing to submit a bid or enter into contract for any work to be financed in whole or in part with federal aid road funds in such manner as will conflict with any act of Congress or any such rules and regulations of the United States Secretary of Agriculture. (1939, c. 230.)
- § 87-10. Application for license; examination; certificate; renewal. -Anyone hereafter desiring to be licensed as a general contractor in this State shall make and file with the Board, thirty days prior to any regular or special meeting thereof, a written application on such form as may then be by the Board prescribed for examination by the Board, which application shall be accompanied by the sum of sixty dollars (\$60.00) if the application is for an unlimited license, or forty dollars (\$40.00) if the application is for an intermediate license, or twenty dollars (\$20.00) if the application is for a limited license; the holder of an unlimited license shall be entitled to engage in the business of general contracting in North Carolina unlimited as to the value of any single project, the holder of an intermediate license shall be entitled to engage in the practice of general contracting in North Carolina but shall not be entitled to engage therein with respect to any single project of a value in excess of three hundred thousand dollars (\$300,000.00), the holder of a limited license shall be entitled to engage in the practice of general contracting in North Carolina but the holder shall not be entitled to engage therein with respect to any single project of a value in excess of seventy-five thousand dollars (\$75,000.00) and the license certificate shall be classified as hereinafter set forth. Before being entitled to an examination an applicant must show to the satisfaction of the Board from the application and proofs furnished that the applicant is possessed of a good character and is otherwise qualified as to competency, ability and integrity, and that the applicant has not committed or done any act, which, if committed or done by any licensed contractor would be grounds under the provisions hereinafter set forth for the suspension or revocation of contractor's license, or that the applicant has not committed or done any act involving dishonesty, fraud, or deceit, or that the applicant has never been refused a license as a general contractor nor had such license revoked, either in this State or in another state, for reasons that should preclude the granting of the license applied for, and that the applicant has never been convicted of a felony: Provided, no applicant shall be refused the right to an examination without being given an opportunity upon such notice, as may be prescribed by the Board, to appear before the Board and produce evidence in support of his application.

The Board shall conduct an examination, either oral or written, of all applicants for license to ascertain the ability of the applicant to make a practical application of his knowledge of the profession of contracting, under the classification contained in the application, and to ascertain the qualifications of the applicant in reading plans and specifications, knowledge of estimating costs, construction, ethics and other similar matters pertaining to the contracting business and knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors, construction and liens. If the results of the examination of applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to engage as a general contractor in the State of North Carolina, as provided in said certificate, which may be limited into four classifications as the common use of the terms are known—that is, (1) building contractor; (2)

highway contractor; (3) public utilities contractor; and (4) specialty contractor, which shall include those whose operations as such are the performance of construction work requiring special skill and involving the use of specialized building trades or crafts, but which shall not include any operations now or hereafter under the jurisdiction, for the issuance of license, by any board or commission

pursuant to the laws of the State of North Carolina.

If an applicant is an individual, examination may be taken by his personal appearance for examination, or by the appearance for examination of one or more of his responsible managing employees, and if a copartnership or corporation, or any other combination or organization, by the examination of one or more of the responsible managing officers or members of the personnel of the applicant, and if the person so examined shall cease to be connected with the applicant, then in such event the license shall remain in full force and effect for a period of thirty days thereafter, and then be canceled, but the applicant shall then be entitled to a re-examination, all pursuant to the rules to be promulgated by the Board: Provided, that the holder of such license shall not bid on or undertake any additional contracts from the time such examined employee shall cease to be connected with the applicant until said applicant's license is reinstated as provided in this article.

Anyone failing to pass this examination may be re-examined at any regular meeting of the Board without additional fee. Certificate of license shall expire on the first day of December following the issuance or renewal and shall become invalid on that day unless renewed, subject to the approval of the Board. Renewals may be effected any time during the month of January without re-examination, by the payment of a fee to the secretary of the Board of thirty dollars (\$30.00) for unlimited license, twenty dollars (\$20.00) for intermediate license and ten dollars (\$10.00) for limited license: Provided, the classification herein provided for shall not apply to contracts of the State Highway and Public Works Commission. (1925, c. 318, s. 9; 1931, c. 62, s. 2; 1937, c. 328; c. 429, s. 3;

1941, c. 257, s. 1.)

Editor's Note.—The 1941 amendment rewrote the section. For comment on the amendment, see 19 N. C. Law Rev. 446.

§ 87-11. Revocation of license; charges of fraud, negligence, incompetency, etc.; hearing thereon; notice of charges; reissuance of certificate. — The Board shall have the power to revoke the certificate of license of any general contractor licensed hereunder who is found guilty of any fraud or deceit in obtaining a license, or gross negligence, incompetency or misconduct in the practice of his profession, or willful violation of any provisions of this article. Any person may prefer charges of such fraud, deceit, negligence or misconduct against any general contractor licensed hereunder; such charges shall be in writing and sworn to by the complainant and submitted to the Board. Such charges, unless dismissed without hearing by the Board as unfounded or trivial, shall be heard and determined by the Board within thirty days after the date in which they were preferred. A time and place for such hearing shall be fixed by the Board and held in the county in which said charges originated or such other county as the Board may designate. A copy of the charges, together with the notice of the time and place of hearing, shall be legally served on the accused at least fifteen days before the fixed date for the hearing, and in the event that such service cannot be effected filteen days before such hearing, then the date of hearing and determination shall be postponed as may be necessary to permit the carrying out of this condition. At said hearing the accused shall have the right to appear personally and by counsel and to cross-examine witnesses against him, her or them, and to produce evidence of witnesses in his, her or their defense. If after said hearing at least four members of the Board vote in favor of finding the accused guilty of any fraud or deceit in obtaining license, or of gross negligence, incompetency or misconduct in practice the Board shall revoke the license of the accused.

The Board may reissue a license to any person, firm or corporation whose license has been revoked: Provided, three or more members of the Board vote in favor of such reissuance for reasons the Board may deem sufficient.

The Board shall immediately notify the Secretary of State of its finding in the case of the revocation of a license or of the reissuance of a revoked license.

A certificate of license to replace any certificate lost, destroyed or mutilated may be issued subject to the rules and regulations of the Board. (1925, c. 318, s. 10; 1937, c. 429, s. 4.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 87-12. Certificate evidence of license.—The issuance of a certificate of license or limited license by this Board shall be evidence that the person, firm or corporation named therein is entitled to all the rights and privileges of a licensed or limited licensed general contractor while the said license remains unrevoked or unexpired. (1925, c. 318, s. 11; 1937, c. 429, s. 5.)

Editor's Note. — The 1937 amendment inserted the words "or limited license" in this section.

§ 87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to Board; penalties. — Any person, firm or corporation not being duly authorized who shall contract for or bid upon the construction of any of the projects or works enumerated in § 87-1, without having first complied with the provisions hereof, or who shall attempt to practice general contracting in this State, except as provided for in this article, and any person, firm, or corporation presenting or attempting to file as his own the licensed certificate of another or who shall give false or forged evidence of any kind to the Board or to any member thereof in maintaining a certificate of license or who falsely shall impersonate another or who shall use an expired or revoked certificate of license, and any architect or engineer who receives or considers a bid from anyone not properly licensed under this article, shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than five hundred dollars or imprisonment of three months, or both fine and imprisonment in the discretion of the court. And the Board may, in its discretion, use its funds to defray the expense, legal or otherwise, in the prosecution of any violations of this article. (1925, c. 318, s. 12; 1931, c. 62, s. 3; 1937, c. 429, s. 6.)

Editor's Note.—The reference to architect or engineer was inserted by the 1931 amendment. And the 1937 amendment

§ 87-14. Regulations as to issue of building permits. — Any person, firm or corporation, upon making application to the building inspector or such other authority of any incorporated city, town or village in North Carolina charged with the duty of issuing building or other permits for the construction of any building, highway, sewer, grading or any improvement or structure where the cost thereof is to be fifteen thousand dollars (\$15,000.00) or more, shall, before he be entitled to the issuance of such permit, furnish satisfactory proof to such inspector or authority that he is duly licensed under the terms of this article to carry out or superintend the same, and that he has paid the license tax required by the Revenue Act of the State of North Carolina then in force so as to be qualified to bid upon or contract for the work for which the permit has been applied; and shall be unlawful for such building inspector or other authority to issue or allow the issuance of such building permit unless and until the applicant

has furnished evidence that he is either exempt from the provisions of this article or is duly licensed under this article to carry out or superintend the work for which permit has been applied; and further, that the applicant has paid the license tax required by the State Revenue Act then in force so as to be qualified to bid upon or contract for the work covered by the permit; and such building inspector, or other such authority, violating the terms of this section shall be guilty of a misdemeanor and subject to a fine of not more than fifty dollars (\$50.00). (1925, c. 318, s. 13; 1931, c. 62, s. 4; 1937, c. 429, s. 7; 1949, c. 934.)

Editor's Note.—Prior to the 1937 amendment this section related to exemptions from ten thousand to fifteen thousand dol-

from the article. The 1949 amendment lars

§ 87-15. Copy of article included in specifications; bid not considered unless contractor licensed.—All architects and engineers preparing plans and specifications for work to be contracted in the State of North Carolina shall include in their invitations to bidders and in their specifications a copy of this article or such portions thereof as are deemed necessary to convey to the invited bidder, whether he be a resident or nonresident of this State and whether a license has been assued to him or not, the information that it will be necessary for him to show evidence of a license before his bid is considered. (1925, c. 318, s. 14; 1937, c. 429, s. 8; 1941, c. 257, s. 2.)

Editor's Note.—The 1937 amendment which was struck out by the 1941 amendadded a second sentence to this section ment.

ARTICLE 2.

Plumbing and Heating Contractors.

§ 87-16. Board of Examiners; appointment; term of office. - For the purpose of carrying out the provisions of this article there is hereby created a State Board of Examiners of Plumbing and Heating Contractors, consisting of seven members to be appointed by the Governor within sixty days after February The said Board shall consist of one member from the engineering school of the Greater University of North Carolina, one member from the State Board of Health, one member to be a plumbing inspector from some city of the State, one licensed master plumber and one heating contractor, one member from the division of public health of the Greater University of North Carolina, and one member to be a licensed air conditioning contractor. The term of office of said members shall be so designated by the Governor that the term of one member shall expire each year. Thereafter in each year the Governor shall in like manner appoint one person to fill the vacancy on the Board thus created. Vacancies in the membership of the Board shall be filled by appointment by the Governor for the unexpired term. Whenever the word "Board" is used in this article, it shall be deemed and held to refer to the State Board of Examiners of Plumbing and Heating Contractors. (1931, c. 52, s. 1; 1939, c. 224, s. 1.)

Local Modification.—Anson: 1939, c. 308; Burke: 1939, c. 297; Carteret, Towns of Morehead City, Beaufort and Atlantic Beach: 1935, c. 338; Durham: 1939, c. 381; Moore, Towns of Southern Pines and Pinehurst: 1935, c. 338; New Hanover:

1935, c. 338; Stanly, Town of Albemarle: 1935, c. 338; Surry, Town of Elkin: 1939, c. 297; Wake: 1939, c. 381.

Editor's Note. — The 1939 amendment increased the members of the Board from five to seven and added the last sentence.

§ 87-17. Removal, qualifications and compensation of members; allowance for expenses.—The Governor may remove any member of the Board for misconduct, incompetency or neglect of duty. Each member of the Board shall be a citizen of the United States and a resident of this State at the time of his appointment. Each member of the Board shall receive ten dollars per day for attending sessions of the Board or of its committees, and for the time

spent in necessary traveling in carrying out the provisions of this article, and in addition to the per diem compensation, each member shall be reimbursed by the Board from funds in its hands for necessary traveling expenses and for such expenses incurred in carrying out the provisions hereof, as shall be approved by a majority of the members of the Board. (1931, c. 52, s. 2.)

§ 87-18. Organization meeting; officers; seal; rules.—The Board shall within thirty days after its appointment meet in the city of Raleigh and organize, and shall elect a chairman and secretary and treasurer, each to serve for one year. Thereafter said officers shall be elected annually. The secretary and treasurer shall give bond approved by the Board for the faithful performance of his duties, in such sum as the Board may, from time to time determine. The Board shall have a common seal and shall formulate rules to govern its actions. (1931, c. 52, s. 3; 1939, c. 224, s. 2.)

Editor's Note. — The 1939 amendment struck out the following words "and each member of the Board shall be empowered to administer oaths and have power to

compel the attendance of witnesses, and it may take testimony and proofs concerning all matters within its jurisdiction."

- § 87-19. Regular and special meetings; quorum. The Board after holding its first meeting as hereinbefore provided, shall thereafter hold at least two regular meetings each year. Special meetings may be held at such times and places as the bylaws and/or rules of the Board provide; or as may be required in carrying out the provisions hereof. A quorum of the Board shall consist of not less than three members. (1931, c. 52, s. 4.)
- § 87-20. Record of proceedings and register of applicants; reports.—The Board shall keep a record of its proceedings and a register of all applicants for examination, showing the date of each application, the name, age and other qualifications, place of business and residence of each applicant. The books and records of the Board shall be prima facie evidence of the correctness of the contents thereof. On or before the first day of March of each year the Board shall submit to the Governor a report of its activities for the preceding year, and file with the Secretary of State a copy of such report, together with a statement of receipts and expenditures of the Board attested by the chairman and secretary. (1931, c. 52, s. 5.)
- § 87-21. Definitions; contractors licensed by Board; towns excepted.—For the purpose of this article plumbing shall be deemed and held to include the plumbing system of a building consisting of water supply distributing pipes, the fixtures and fixture traps, soil, waste and vent pipes, all with their devices, appurtenances and connections, and all within, adjacent to or connected with the building, however shall not include the repair or installation of water supply pipe from the street to plumbing fixtures not connected with the sewerage or ventilating systems or to the repair or replacement of outside water faucets. For the purpose of this article heating shall be deemed and held to include all heating systems of a building requiring the use of high or low pressure steam, vapor, hot water, warm or conditioned air, and all piping, ducts, connections or mechanical equipment appurtenant thereto within, adjacent to or connected with the building. Any person, firm or corporation, who, for a valuable consideration, installs, alters or restores or offers to install, alter or restore either plumbing or heating, or both, as defined in this article, shall be deemed to be engaged in the business of either plumbing or heating contracting, or both, as the case may be. All persons, firms or corporations, whether resident or nonresident of the State of North Carolina, before engaging in either the plumbing or heating contracting business, or both, as defined in this article, shall first apply to the State Board of Examiners of Plumbing and Heating Contractors for examination and shall procure a license. Each application shall be accompanied by a certified

check in the amount of the annual license fee required by this article. In order to promote the health, comfort, and safety of the people of the State of North Carolina in the regulation of the business of plumbing or heating contracting, the Board shall give each applicant for license an examination designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating costs, construction, fundamentals of design and installation, sanitation, fire hazards, and related subjects. Regular examinations shall be given by the Board in the months of February and August of each year; and additional examinations may be given at such other time as the Board may deem necessary. Any person, firm or corporation may demand in writing a special examination, and upon payment by the applicant of the cost of holding such examination and the deposit of the amount of the annual license fee, the Board in its discretion will fix a time and place for such examination to be given, not less than ten nor more than thirty days from receipt of the written demand and the deposit of the cost. As the result of such examination, all applicants found by the Board to be qualified to engage in and carry on the business of either plumbing or heating contracting, or both, as defined in this article, shall be entitled to and shall receive a license to do so. The said Board shall have authority to issue a limited heating license to any applicant who establishes to the satisfaction of the Board, by such examination, that he is qualified to engage in the business of heating contracting by the installation, alteration and renovation of any one or more types of heating systems, but such limited license shall authorize the licensee to engage in the heating contracting business only to the extent and under the conditions recited in the license. The Board shall, within thirty days after March 30, 1939, meet and classify the business of heating contracting into the following groups for the purpose of issuing limited licenses as provided in this article: Group number one to consist of the installation, alteration or restoration of all heating systems which involve the use of high or low pressure steam, vapor, hot water and all piping, ducts, connections or mechanical equipment appurtenant thereto, within, adjacent or connected with a building; group number two to consist of the installation, alteration or restoration of all air conditioning systems which provide conditioned air for comfort cooling by the lowering of temperature within a building, including all parts and accessories necessary thereto. Persons, firms or corporations now holding licenses for heating contracting in accordance with the provisions of §§ 87-16 to 87-27 shall be granted, without examination, a limited heating license under group number one as classified under this section. Section 87-25 shall not apply to any person, firm or corporation engaged in the business of heating contracting as classified under group number two as defined in this section prior to January first one thousand nine hundred and forty. Employees who work under the supervision and jurisdiction of a person, firm or corporation, licensed in accordance with the provisions of this article, shall not be required to apply for and obtain a license while so engaged. The requirements of this article shall apply only to persons, firms or corporations engaged in the business of either plumbing or heating contracting, or both, in cities or towns having a population of more than thirty-five hundred. (1931, c. 52, s. 6; 1939, c. 224, s. 3.)

Editor's Note. — The 1939 amendment rewrote this section.

Validity of Classification of Subjects of Taxation.—If the classification of the subjects of taxation, provided for in this section, is not arbitrary and unjust it cannot be regarded in law as a breach of the rule of uniformity. Classification by population is not in itself arbitrary, unreasonable, or unjust. Roach v. Durham, 204 N. C.

587, 169 S. E. 149 (1933).

A journeyman plumber, duly licensed under the ordinances of a municipality, who furnishes no materials, supplies or fixtures, but merely attaches or replaces fixtures, and does not install plumbing systems or make substantial alterations thereof, is not engaged in carrying on the business of plumbing and heating contracting within this section, since plumbing is defined in

the act in terms of the "plumbing system" and the act refers to plumbing and heating "contractors," and even granting that the definition in the act is ambiguous and is susceptible to a construction which would include journeyman plumbers, the court

could not adopt such construction, since the statute must be given that construction which is favorable to defendant and tends least to interfere with personal liberty. State v. Mitchell, 217 N. C. 244, 7 S. E. (2d) 567 (1940).

§ 87-22. License fee based on population; expiration and renewal; penalty.—All persons, firms, or corporations engaged in the business of either plumbing or heating contracting, or both, in cities or towns of ten thousand inhabitants or more shall pay an annual license fee of fifty dollars, and in cities or towns of more than thirty-five hundred and less than ten thousand inhabitants an annual license fee of twenty-five dollars. In the event the Board refuses to license an applicant, the license fee deposited shall be returned by the Board to the applicant. All licenses shall expire on the last day of December in each year following their issuance or renewal. It shall be the duty of the secretary and treasurer to cause to be mailed to every licensee registered hereunder notice to his last known address of the amount of fee required for renewal of license, such notice to be mailed at least one month in advance of the expiration of said license. In the event of failure on the part of any person, firm or corporation to renew the license certificate annually and pay the fee therefor during the month of January in each year, the Board shall increase said license fee ten per centum for each month or fraction of a month that payment is delayed; provided that the penalty for nonpayment shall not exceed the amount of the annual fee, and provided, further, that no penalty will be imposed if one-half of the annual license fee is paid in January and the remaining one-half in June of each year. (1931, c. 52, s. 7; 1939, c. 224, s. 4.)

Editor's Note. — The 1939 amendment rewrote this section.

§ 87-23. Revocation or suspension of license for cause.—The Board shall have power to revoke or suspend the license of any plumbing or heating contractor, or both, who is guilty of any fraud or deceit in obtaining a license, or who fails to comply with any provision or requirement of this article, or for gross negligence, incompetency, or misconduct, in the practice of or in carrying on the business of either a plumbing or heating contractor, or both, as defined in this article. Any person may prefer charges of such fraud, deceit, gross negligence, incompetency, misconduct, or failure to comply with any provision or requirement of this article, against any plumbing or heating contractor, or both, who is licensed under the provisions of this article. All of such charges shall be in writing and verified by the complainant, and such charges shall be heard and determined by the Board within ninety days after the same are received by it. A time and place for such hearing shall be fixed by the Board and a copy of said charges together with notice of the time and place of hearing, shall be furnished to the person, firm, or corporation accused at least thirty days before the date fixed for the hearing. At said hearing the person accused shall have the right to appear personally, or by counsel, and be heard in defense of said charges. Upon the conclusion of said hearing, if the Board finds that the license of the accused person should be revoked or suspended for any one or more of the causes set forth in this section, the Board shall enter upon its records a resolution revoking or suspending the license and furnish a copy of said resolution to the accused. Any person, firm, or corporation whose license shall be revoked or suspended by the Board shall have the right to appeal to the superior court of the county in which the accused maintains his or its principal place of business, said appeal to be perfected within thirty days after receipt of the Board's resolution by the accused, but not thereafter. (1931, c. 52, s. 8; 1939, c. 224, s. 5.)

Cross Reference.—As to uniform procedure for suspension or revocation of li
Editor's Note.—The 1939 amendment

inserted the words "or suspend" near the beginning of the section and made other changes.

Purpose of Law.—The manifest purpose of the law is to promote the health, com-

fort, and safety of the people by regulating plumbing and heating in public and private buildings. Roach v. Durham, 204 N. C. 587, 169 S. E. 149 (1933).

- § 87-24. Reissuance of revoked licenses; replacing lost or destroyed licenses.—The Board may in its discretion reissue license to any person, firm or corporation whose license may have been revoked: Provided, three or more members of the Board vote in favor of such reissuance for reasons deemed sufficient by the Board. A new certificate of registration to replace any license which may be lost or destroyed may be issued subject to the rules and regulations of the Board. (1931, c. 52, s. 9.)
- § 87-25. Violations made misdemeanor; employees of licensees excepted.—Any person, firm or corporation who shall engage in or offer to engage in, or carry on the business of either plumbing or heating contracting, or both, as defined in § 87-21, without first having been licensed to engage in such business, or businesses, as required by the provisions of this article; or any person, firm or corporation holding a limited heating license under the provisions of this article who shall practice or offer to practice or carry on any type of heating contracting not authorized by said limited license; or any person, firm or corporation who shall give false or forged evidence of any kind to the Board, or any member thereof, in obtaining a license, or who shall falsely impersonate any other practitioner of like or different name, or who shall use an expired or revoked license, or who shall violate any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction fined not less than one hundred dollars or imprisoned for not more than three months, or both, in the discretion of the court. Employees, while working under the supervision and jurisdiction of a person, firm or corporation licensed in accordance with the provisions of the article, shall not be construed to have engaged in the business of either plumbing or heating contracting, or both. (1931, c. 52, s. 10; 1939, c. 224, s. 6.)

Editor's Note. — The 1939 amendment rewrote this section.

Acts Not Constituting Contracting.—A journeyman plumber, contracting and agreeing with various persons to perform labor required to install certain plumbing at a stipulated lump sum price, and who does not maintain a fixed place of business or sell or contract to furnish materials, supplies or fixtures of any kind, and who

fails to obtain a license from the State Board of Examiners of Plumbing and Heating Contractors, is not guilty of a misdemeanor under the provisions of this section, since his occupation does not constitute carrying on the "business of plumbing and heating contracting" within the meaning of the penal provisions of the statute. State v. Ingle, 214 N. C. 276, 199 S. E. 10 (1938).

§ 87-26. Only one person in partnership or corporation need have license. — A corporation or partnership may engage in the business of either plumbing or heating, or both, provided one or more persons connected with such corporation or partnership is registered and licensed as herein required; and provided such licensed person shall execute all contracts, exercise general supervision over the work done thereunder and be responsible for compliance with all the provisions of this article. (1931, c. 52, s. 12; 1939, c. 224, s. 8.)

Editor's Note. — The 1939 amendment sion as to receiving license without exadded the part of the section appearing amination.

after the semicolon, and omitted a provi-

§ 87-27. License fees payable in advance; application of. — All license fees shall be paid in advance to the secretary and treasurer of the Board and by him held as a fund for the use of the Board. The compensation and expenses of the members of the Board as herein provided, the salaries of its employees, and all expenses incurred in the discharge of its duties under this article shall be paid out of such fund, upon the warrant of the president and secretary

and treasurer: Provided, upon the payment of the necessary expenses of the Board as herein set out, and the retention by it of twenty-five per centum of the balance of funds collected hereunder, the residue, if any, shall be paid to the State Treasurer. (1931, c. 52, s. 13; 1933, c. 57; 1939, c. 224, s. 9.)

Editor's Note. — The 1933 amendment made a former proviso applicable in towns of less than 10,000 instead of 5,000, and added a proviso relating to renewals. These provisos were deleted by the 1939 amendment.

It is obvious that the pervading intent of this section is to provide for the maintenance of the Board and not to impose a tax

as a part of the general revenue of the State and thereby exclude the operation of the police power. It is true that the act does not in express words authorize the exercise of this power, but in our opinion it appears by implication that the exercise of such power was intended. Roach v. Durham, 204 N. C. 587, 169 S. E. 149 (1933).

ARTICLE 3.

Tile Contractors.

§ 87-28. License required of tile contractors.—In order to protect the health and safety of the people of North Carolina any person, firm or corporation desiring to engage in tile contracting within the State of North Carolina as defined in this article shall make application in writing for license to the North Carolina Licensing Board for Tile Contractors: Provided, that the provisions of this article shall not apply to State colleges, hospitals and other State buildings. (1937, c. 86, s. 1; 1941, c. 219, s. 1.)

Editor's Note.—The first fourteen words in the section from "institutions" to "buildof the section were added by the 1941 ings." For comment on the amendment, amendment, which changed the last word see 19 N. C. Law Rev. 446.

§ 87-29. Tile contracting defined.—Engaging in tile contracting for the purpose of this article is defined to mean any person, firm or corporation who for profit undertakes to lay, set or install ceramic tile, marble, or terrazzo floors or walls in buildings for private or public use. (1937, c. 86, s. 2; 1939, c. 75, s. 1; 1941, c. 219, s. 2.)

Editor's Note. — The 1941 amendment rewrote this section as changed by the 1939 amendment. For comment on 1939

amendment to this article, see 17 N. C. Law Rev. 337.

- § 87-30. Licensing Board created; membership; appointment and removal.—The North Carolina Licensing Board for Tile Contractors shall consist of five members, each of whom shall be a reputable tile contractor residing in the State of North Carolina who has been engaged in the business of tile contracting for at least five years. The members of the first Board shall be appointed within sixty days after March 1, 1937, for terms of one, two, three, four, and five years by the Governor, and the Governor in each year thereafter shall appoint one licensed tile contractor to fill the vacancy caused by the expiration of the term of office, the term of such new member to be for five years. If vacancy shall occur in the Board for any cause the same shall be filled by appointment of the Governor. The Governor shall have the power to remove from office any member of said Board for incapacity, misconduct, or neglect of duty. (1937, c. 86, s. 3.)
- § 87-31. Oath of office; organization; meetings; authority; compensation.—The members of said Board shall qualify by taking an oath of office in writing to be filed with the Secretary of State to uphold the Constitution of the United States and the Constitution of North Carolina and to properly perform the duties of his office. The Board shall elect a president, vice-president, and secretary-treasurer. A majority of the members of the Board shall constitute a quorum. Regular meetings shall be held at least twice a year, at such

time and place as shall be deemed most convenient. Due notice of such meetings shall be given to all applicants for license in such manner as the bylaws may provide. The Board may prescribe regulations, rules, and bylaws for its own proceedings and government and for the examination of applicants not in conflict with the laws of North Carolina. Special meetings may be held upon a call of three members of the Board. Each member of the Board shall receive for his services the sum of ten (\$10.00) dollars per day for each and every day spent in the performance of his duties, and shall be reimbursed for all necessary expenses incurred in the discharge of his duties. (1937, c. 86, s. 4.)

- § 87-32. Secretary-treasurer, duties and bond; seal; annual report to Governor.—It shall be the duty of the secretary-treasurer to keep a record of all proceedings of the Board and all licenses issued, and to pay all necessary expenses of the Board out of the funds collected, and he shall give such bond as the Board shall direct. All funds in excess of the sum of one hundred (\$100.00) dollars remaining in the hands of the secretary-treasurer, after all of the expenses of the Board for the current year have been paid, shall be paid over to the Greater University of North Carolina for the use of the ceramic engineering department of North Carolina State College to be devoted by it to the development of the safe, proper, and sanitary uses of tile. The Board shall adopt a seal to be affixed to all of its official documents, and shall make an annual report of its proceedings to the Governor on or before the first day of March of each year, which report shall contain an account of all moneys received and disbursed. (1937, c. 86, s. 5.)
- § 87-33. Applications for examinations; fee; qualifications of applicants.—Any person desiring to be examined by said Board shall at least two weeks prior to the holding of an examination file an application upon the prescribed form to be furnished by the Board. Each applicant upon making an application shall pay to the secretary-treasurer of the Board an examination fee of twenty-five dollars (\$25.00). To qualify and obtain a license such applicant must be a citizen of the United States, or person who has duly declared his intention of becoming such citizen, who shall have had at least two years' experience, or its equivalent, next preceding the date of his application for license as a tile, marble and terrazzo student or mechanic, possessing the knowledge to specify the proper kind of tile, marble and terrazzo floors or walls for use in private or public buildings, and the ability to lay, set or install tile, marble and terrazzo in accordance with specifications and blueprints ordinarily used in the tile contracting business. (1937, c. 86, s. 6; 1941, c. 219, s. 6.)

 Editor's Note.—The 1941 amendment omitted a provision relating to registra-

Editor's Note.—The 1941 amendment omitted a provision relating to registrachanged the wording of the first sentence, tion and certificate thereof. added the present second sentence and

- § 87-34. Fee for annual renewal of registration; license revoked for default; penalty for reinstatement.—Every licensed tile contractor who desires to continue in business in this State shall annually, on or before the first day of January of each year, pay to the secretary-treasurer of the Board the sum of fifty (\$50.00) dollars for which he shall receive a renewal of such registration, and in case of the default of such registration by any person the license shall be revoked. Any licensed tile contractor whose license has been revoked for failure to pay the renewal fee, as herein provided, may apply to have the same regranted upon payment of all renewal fees that should have been paid, together with a penalty of ten (\$10.00) dollars. (1937, c. 86, s. 7.)
- § 87-35. Power of Board to revoke or suspend licenses; charges; notice and opportunity for hearing; appeal.—The Board shall have the power after hearing to revoke or suspend the license of any tile contractor upon satisfactory proof that such license was secured by fraud or deceit practiced

upon the Board, or upon satisfactory proof that such tile contractor is guilty of gross negligence, incompetency, or inefficiency in carrying on the business of tile contracting. Each charge against any contractor submitted to the Board shall be in writing and sworn to by the complainant: Provided, however, that before any license shall be revoked or suspended the holder thereof shall have notice of the specific charge or charges preferred, and at a date specified in said notice, at least thirty days after legal service thereof, be given public hearing, and have an opportunity to appear, cross-examine witnesses, and to produce evidence. Any person being aggrieved by the action of the Board shall have the right of appeal to the superior court. (1937, c. 86, s. 8.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—While the provision as to examination of applicants refers only to those who were not so engaged at the time the statute went into effect, the provisions as to revocation refer to all. 15 N. C. Law Rev. 326.

§ 87-36. No examination required of present contractors.—All persons, firms or corporations now actively engaged in the tile contracting business in the State of North Carolina shall upon filing affidavit with the Board be entitled to and receive a license without examination upon payment of the annual license fee. (1937, c. 86, s. 9; 1939, c. 75, s. 3; 1941, c. 219, s. 9.)

ing into contracts where the contract price proviso added by the 1939 amendment. did not exceed two hundred and fifty dol-

Editor's Note. - The 1939 amendment lars. The 1941 amendment inserted the added a proviso exempting persons enter- words "be entitled to" and omitted the

§ 87-37. License to one member of firm, etc., sufficient; employees exempt; restricted application of article.—Any firm, partnership or corporation may engage in the tile contracting business in this State, provided, one member of said firm, partnership or corporation is a licensed tile contractor actually employed by said firm, partnership or corporation, and personally present in charge of such tile contracting work. No license shall be required of any mechanic or employee of a licensed tile contractor performing duties for the employer. Provided, however, that none of the provisions of this article shall apply to jobs in which the total cost of tile, labor and other materials necessary for laying same is less than one hundred and fifty dollars (\$150.00). (1937, c. 86, s. 10; 1941, c. 219, s. 10.)

Editor's Note. - The 1941 amendment sentence and added the proviso at the end made changes in the wording of the first of the section.

§ 87-38. Penalty for misrepresentation or fraud in procuring or maintaining license certificate.—Any person, firm, or corporation not being duly licensed to engage in tile contracting in this State as provided for in this article who engages therein, and any person, firm, or corporation presenting as his own the license certificate of another or who shall give false or forged evidence of any kind to the Board or any member thereof in maintaining a certificate of license, or who shall falsely impersonate another, or who shall use an expired or revoked certificate of license, or an architect, engineer or contractor who receives or considers a bid from anyone not properly licensed under this article, shall be guilty of misdemeanor, and for each offense of which he is convicted be punished by a fine of not less than two hundred (\$200.00) dollars, or by imprisonment of not less than two months or both fined and imprisoned in the discretion of the court. (1937, c. 86, s. 11; 1939, c. 75, s. 4.)

after the word "article" near the beginning of the section.

Prior to the 1939 amendment it was held that the section failed to define the acts

Editor's Note. — The 1939 amendment prohibited, the doing of which should coninserted the words "who engages therein" stitute a misdemeanor, and that such fatal deficiency could not be supplied by judicial interpolation of words to constitute a criminal offense. State v. Julian, 214 N. C. 574, 200 S. E. 24 (1938).

ARTICLE 4.

Electrical Contractors.

- § 87-39. Board of Examiners created; members appointed and officers; terms; principal office; meetings; quorum; compensation and expenses.—A State Board of Examiners of Electrical Contractors is hereby created, which shall consist of the State Electrical Engineer, who shall act as chairman of the Board, the secretary of the Association of Electrical Contractors of North Carolina, and three other members to be appointed by the Governor as follows: One from the faculty of the engineering school of the Greater University of North Carolina, one person who is serving as chief electrical inspector of a municipality in the State of North Carolina, and one representative of a firm, partnership or corporation located in the State of North Carolina and engaged in the business of electrical contracting. Of the three appointed members one shall be appointed for a term of one year, one for a term of two years, and one for a term of three years, and until their respective successors are appointed and qualified; and thereafter each appointment shall be for a term of three years. The principal office of the Board shall be at such place as shall be designated by a majority of the members thereof. The Board of Examiners shall hold regular meetings quarterly and may hold special meetings on call of the chairman. They shall annually appoint and at their pleasure remove a secretarytreasurer, who need not be a member of the Board, and whose duties shall be prescribed and whose compensation shall be fixed by the Board. Three members of the Board shall constitute a quorum. The appointive members of the Board shall be entitled to receive the sum of seven dollars (\$7.00) and actual and necessary expenses for each day actually devoted to the performance of their duties under this article: Provided, however, that none of the expenses of said Board or the compensation or expenses of any officer thereof or any employee shall ever be paid or payable out of the treasury of the State of North Carolina; and neither the Board nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt or other financial obligation binding upon the State of North Carolina. (1937, c. 87, s. 1.)
- § 87-40. Board to appoint secretary-treasurer within thirty days; bond required; oath of membership.—The Board of Examiners of Electrical Contractors shall within thirty days after its appointment meet at the time and place designated by the chairman and appoint a secretary-treasurer. The secretary-treasurer shall give a bond approved by the Board for the faithful performance of his duties in such form as the Board may from time to time prescribe. The Board shall have a common seal and shall formulate rules to govern its actions and may take testimony and proof concerning all matters within its jurisdiction. Before entering upon the performance of their duties hereunder each member of the Board shall take and file with the Secretary of State an oath in writing to properly perform the duties of his office as a member of said Board, and to uphold the Constitution of North Carolina and the Constitution of the United States. (1937, c. 87, s. 2.)
- § 87-41. Seal for Board; duties of secretary-treasurer; surplus funds; contingent or emergency fund.—The Board shall adopt a seal for its own use. The seal shall have inscribed thereon the words "Board of Examiners of Electrical Contractors, State of North Carolina," and the secretary shall have charge and custody thereof. The secretary-treasurer shall keep a record of the proceedings of said Board and shall receive and account for all moneys derived under the operations of this article. Any funds remaining in the hands of the secretary-treasurer to the credit of the Board after the expenses of the Board for the current year have been paid shall be paid over to the electrical engineering department of the Greater University of North Carolina to be used for electrical experimentations: Provided, however, the Board shall have the right to retain as

a contingent or emergency fund ten per cent of such gross receipts in each year of its operation. (1937, c. 87, s. 3.)

- § 87-42. Board to give examinations and issue licenses.—It shall be the duty of the Board of Examiners of Electrical Contractors to receive all applications for licenses filed by persons, or representatives of firms or corporations seeking to enter upon or continue in the electrical contracting business within the State of North Carolina, as such business is herein defined, and upon proper qualification of such applicant to issue the license applied for; to prescribe the conditions of examination of, and, subject to the provisions of this article, to give examinations to all persons who are under the provisions of this article required to take such examination. (1937, c. 87, s. 4.)
- § 87-43. Persons required to obtain licenses; examination required; licenses for firms or corporations.—No person, firm or corporation shall engage in the business of installing, maintaining, altering or repairing within the State of North Carolina any electric wiring, devices, appliances or equipment for which a permit is now or may hereafter be required by the statutes of the State of North Carolina, or by municipal or county ordinances in the county in which such work is undertaken, dealing with the erection and inspection of buildings and fire protection and electrical installation unless such person, firm or corporation shall have received from the Board of Examiners of Electrical Contractors an electrical contractor's license: Provided, however, that the provisions of this article shall not apply (a) to the installation, construction, or maintenance of power systems for the generation and primary and secondary distribution of electric current ahead of the customer's meter; (b) to the installation, construction, maintenance, or repair of telephone, telegraph, or signal systems, by public utilities; (c) to any mechanic employed by a licensee of this Board; (d) to the installation, construction or maintenance of electrical equipment and wiring for temporary use by contractors in connection with the work of construction; (e) to the installation, construction, maintenance or repair of electrical wiring, devices, appliances or equipment by persons, firms or corporations, upon their own property, who maintain in regular and full-time employment electricians, when such electricians are employed and engaged exclusively by such persons, firms or corporations; (f) to the installation, construction, maintenance or repair of electrical wiring, devices, appliances or equipment by State institutions and private educational institutions which maintain a private electrical department. No license shall be issued by said Board without an examination of the applicant for the purpose of ascertaining his qualifications for such work, but no such examination shall be required for the annual renewal of such license: Provided, however, that persons, firms or corporations residing in the State of North Carolina on March 1, 1937, who have paid the license fees required of electrical contractors by the State Revenue Act of one thousand nine hundred and thirty-five, upon proper certification or establishment of such fact, shall be granted a license by the Board of Examiners under this article without examination. Firms or corporations shall be eligible to secure licenses from the Board of Examiners provided they have in their respective organizations at least one person duly qualified as an electrical contractor under the provisions of this article. No license or renewal of any license shall be issued to any applicant until the fees herein prescribed shall have been paid. (1937, c. 87, s. 5.)
- § 87-44. Fees for licenses.—Before a license is granted to any applicant, and before any expiring license is renewed, the applicant shall pay to the Board of Examiners of Electrical Contractors a fee in such an amount as is herein specified for the license to be granted or renewed as follows:

- § 87-45. Licenses expire on June 30th, following issuance; renewal; fees used for administrative expense.—Each license issued hereunder shall expire on June thirtieth following the date of its issuance, and shall be renewed by the Board of Examiners of Electrical Contractors upon application of the holder of the license and payment of the required fee at any time within thirty days before the date of such expiration. Licenses renewed subsequent to the date of expiration thereof may in the discretion of the Board be subject to a penalty not exceeding ten per cent. The fees collected for licenses under this article shall be used for the expenses of the Board of Examiners in carrying out the provisions of this article, subject to the provisions herein made with reference to payment of surplus to the electrical engineering department of the Greater University of North Carolina for electrical experimental purposes. (1937, c. 87, s. 7.)
- § 87-46. Examination before local examiner. In order that applicants for licenses hereunder who are by the provisions of this article required to take an examination before the issuance thereof shall not be subject to any unreasonable inconvenience in connection therewith, the Board of Examiners of Electrical Contractors may, and upon the request of the board of commissioners of any county shall delegate to the electrical inspector of the county in which such applicant resides, or if there be no county electrical inspector, then to the electrical inspector of any municipality therein, the authority to conduct examinations of such applicant or applicants residing in such county, such examination, however, to be as prescribed by the Board of Examiners. In such an event the local examiner herein provided for shall transmit to the Board of Examiners of Electrical Contractors the results of such examination, and, if approved by the Board, licenses on the basis of such examination shall be issued to the applicants upon the payment of the fees herein prescribed. (1937, c. 87, s. 8.)
- § 87-47. License signed by chairman and secretary-treasurer under seal of Board; display in place of business required; register of licenses; records.—Licenses issued hereunder shall be signed by the chairman and the secretary-treasurer of the Board of Examiners, under the seal of the Board. Every holder of license shall keep his certificate of license displayed in a conspicuous place in his principal place of business. The secretary of the Board shall keep a register of all licenses to electrical contractors, which said register shall be open during the ordinary business hours for public inspection. The Board of Examiners shall keep minutes of all of its proceedings and an accurate record of its receipts and disbursements, which record shall be audited at the close of each fiscal year by a certified public accountant, and within thirty days after the close of each fiscal year a summary of its proceedings and a copy of the audit of its books shall be filed with the Governor and the Treasurer of the State. (1937, c. 87, s. 9.)
- § 87-48. Licenses not assignable or transferable; suspension or revocation.—No license issued in accordance with the provisions of this article shall be assignable or transferable. Any such license may, after hearing, be suspended for a definite length of time or revoked by the Board of Examiners if the person, firm or corporation holding such license shall willfully or by reason of incompetence violate any of the statutes of the State of North Carolina, or any ordinances of any municipality or county relating to the installation, maintenance, alteration or repair of electric wiring, devices, appliances or equipment. (1937, c. 87, s. 10.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—While the provision as to examination of applicants refers only to those who were not so engaged at the time the statute went into effect, the provision as to revocation refers to all. There is no provision for an appeal to the superior court, but an electrical contractor whose license is suspended or revoked undoubtedly has such a right. 15 N. C. Law Rev. 326.

- § 87-49. License does not relieve from compliance with codes or laws. —Nothing in this article shall relieve the holder or holders of licenses issued under the provisions hereof from complying with the building or electrical codes or statutes or ordinances of the State of North Carolina, or of any county or municipality thereof, now in force or hereafter enacted. (1937, c. 87, s. 11.)
- § 87-50. Responsibility for negligence; nonliability of Board. Nothing in this article shall be construed as relieving the holder of any license issued hereunder from responsibility or liability for negligent acts on the part of such holder in connection with electrical contracting work; nor shall the Board of Examiners of Electrical Contractors be accountable in damages, or otherwise, for the negligent act or acts of any holder of such license. (1937, c. 87, s. 12.)
- § 87-51. Penalty for violation of article.—Any person, firm or corporation who shall violate any of the provisions of this article, or who shall engage or undertake to engage in the business of electrical contracting as herein defined, without first having obtained a license under the provisions of this article, shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars (\$25.00) or more than fifty dollars (\$50.00) for each offense. Conviction of a violation of this article on the part of a holder of a license issued hereunder shall automatically have the effect of suspending such license until such time as it shall have been reinstated by the Board of Examiners of Electrical Contractors. (1937, c. 87, s. 13.)

Chapter 88.

Cosmetic Art.

Sec.
88-1. Practice of cosmetology regulated.
88-2. Cosmetic art.

88-3. Cosmetologist.

88-4. Beauty parlor, etc.

88-5. Manager. 88-6. Operator.

88-7. Itinerant cosmetologist; application of chapter.

88-8. Manicurist.

88-9. Apprentice.

88-10. Qualifications for certificate of registration.

88-11. When apprentice may operate shop.

88-12. Qualifications for registered cosmetologist.

88-13. State Board of Cosmetic Art Examiners created; appointment and qualifications of members; term of office; removal for cause.

88-14. Office in Raleigh; seal; officers and secretary.

Sec.

88-15. Compensation and expenses of Board members; inspectors; reports; budget; audit.

88-16. Applicants for examination.

88-17. Regular and special meetings of Board; examinations.

88-18. Certificate of registration.

88-19. Admitting operators from other states.

88-20. Registration procedure.

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88-22. Persons exempt.

88-23. Rules and regulations of Board.

88-24. Posting of certificates.

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88-27. Hearing on charges.

88-28. Acts made misdemeanors.

88-28.1. Restraining orders against persons engaging in illegal practices.

88-29. Records to be kept by Board.

§ 88-1. Practice of cosmetology regulated.—On and after June thirtieth, one thousand nine hundred and thirty-three, no person or combination of persons shall for pay, or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the State of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this chapter by the State Board of Cosmetic Art Examiners hereinafter established. (1933, c. 179, s. 1.)

§ 88-2. Cosmetic art.—Any one or a combination of the following practices, when done for pay, or reward, shall constitute the practice of cosmetic

art in the meaning of this chapter:

The systematic massaging with the hands or mechanical apparatus of the scalp, face, neck, shoulders and hands; the use of cosmetic preparations and antiseptics; manicuring; cutting, dyeing, cleansing, arranging, dressing, waving, and marcelling of the hair, and the use of electricity for stimulating growth of hair. (1933, c. 179, s. 2.)

- § 88-3. Cosmetologist.—"Cosmetologist" is any person who, for compensation, practices cosmetic art, or conducts, or maintains a cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 3.)
- § 88-4. Beauty parlor, etc.—"Cosmetic art shop," "beauty parlor," or "hairdressing establishment" is any building, or part thereof wherein cosmetic art is practiced. (1933, c. 179, s. 4.)
- § 88-5. Manager.—"Manager," or "managing cosmetologist," as used in this chapter, is defined as any person who has direct supervision over operators, or apprentices in a cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 5.)
 - § 88-6. Operator.—"Operator" is any person who is not a manager,

itinerant, or apprentice cosmetologist, who practices cosmetic art under the direction and supervision of a managing cosmetologist. (1933, c. 179, s. 6.)

- § 88-7. Itinerant cosmetologist; application of chapter.—"Itinerant cosmetologist" is any person who practices as a business cosmetic art outside of a cosmetic art shop, beauty parlor, or hairdressing establishment, either in going from house to house or from place to place at regular, or irregular intervals: Provided, this chapter shall not apply to persons attending female institutions of learning, who defray the cost or a part of the cost of such attendance by the occasional practice of cosmetic art as defined herein, or to persons practicing the cosmetic art in rural communities without the use of mechanical appliances. (1933, c. 179, s. 7.)
- § 88-8. Manicurist. "Manicurist" is any person who does manicuring only, outside of a cosmetic art shop, beauty parlor, or hairdressing establishment, for compensation. (1933, c. 179, s. 8.)
- § 88-9. Apprentice.—"Apprentice" is any person who is not a manager, itinerant cosmetologist, or operator, who is engaged in learning and acquiring the practice of cosmetic art under the direction and supervision of a licensed managing cosmetologist. (1933, c. 179, s. 9.)
- § 88-10. Qualifications for certificate of registration.—No person shall be issued a certificate of registration as a registered apprentice by the State Board of Cosmetic Art Examiners, hereinafter established—

(a) Unless such person is at least eighteen years of age.

(b) Unless such person passes a satisfactory physical examination prescribed by the said Board of Cosmetic Art Examiners.

(c) Unless such person has completed at least one thousand hours in classes in a reliable cosmetic art school, or college approved by said Board of Cosmetic Art Examiners.

(d) Unless such person passes the examination prescribed by the Board of Cosmetic Art Examiners and pays the required fees hereinafter enumerated. (1933, c. 179, s. 10; 1941, c. 234, s. 1.)

Editor's Note.—The 1941 amendment subsection (c). For comment on the substituted "one thousand" for "four hundred and eighty" formerly appearing in

- § 88-11. When apprentice may operate shop.—No registered apprentice, registered under the provisions of this chapter, shall operate a cosmetic art beauty shop, beauty parlor, or hairdressing establishment in this State, but must serve his or her period of apprenticeship under the direct supervision of a registered managing cosmetologist as required by this chapter: Provided, however, that any apprentice who, on June 30, 1933, is regularly employed under the direct supervision of one who is entitled to registration as a managing cosmetologist under the provisions of § 88-19 shall, upon recommendation of such managing cosmetologist, and upon passing a satisfactory physical examination, be entitled to registration as a registered cosmetologist. (1933, c. 179, s. 11.)
- § 88-12. Qualifications for registered cosmetologist.—Any person to practice cosmetic art as a registered cosmetologist must have worked as a registered apprentice for a period of at least six months under the direct supervision of a registered managing cosmetologist, and this fact must be demonstrated to the Board of Cosmetic Art Examiners by the sworn affidavit of three registered cosmetologists, or by such other methods of proof as the Board may prescribe and deem necessary. A certificate of registration as a registered cosmetologist shall be issued by the Board, hereinafter designated, to any person who is qualified under the provisions of this chapter, or meets the following qualifications:

(a) Who is qualified under the provisions of § 88-10.

(b) Who is at least nineteen years of age.

(c) Who passes a satisfactory physical examination as prescribed by said Board.

(d) Who has practiced as a registered apprentice for a period of six months, under the immediate personal supervision of a registered cosmetologist; and

(e) Who has passed a satisfactory examination, conducted by the Board, to determine his or her fitness to practice cosmetic art, such examination to be prepared and conducted, as to determine whether or not the applicant is possessed of the requisite skill in such trade, to properly perform all the duties thereof, and services incident thereto, and has sufficient knowledge concerning the diseases of the face, skin, and scalp, to avoid the aggravation and spreading thereof in the practice of said profession. (1933, c. 179, s. 12.)

88-13. State Board of Cosmetic Art Examiners created; appointment and qualifications of members; term of office; removal for cause. -A board to be known as the State Board of Cosmetic Art Examiners is hereby established, to consist of three members appointed by the Governor of the State. Each member shall be an experienced cosmetologist, who has followed the practice of all branches of the cosmetic art in the State of North Carolina for at least five years next preceding his or her appointment, and who, during such period of time, and at the time of appointment, shall be free of connection in any manner with any cosmetic art school or college or academy or training school. The appointment of the Governor shall be for a term of three years. The Governor, at his option, may remove any member for good cause shown and appoint members to fill unexpired terms. (1933, c. 179, s. 13; 1935, c. 54, s. 2.)

Editor's Note .- The requirement that the appointee shall be free from connection with cosmetic art school or college was new with the 1935 amendment, as was also the requirement for following "all branches" of the cosmetic art. Prior to the amendment the section provided that the first appointees should serve for three years, two years and one year respectively.

Relator Must Show Interest in Action

to Vacate Office.—It is necessary that a relator in an action to vacate an office under this section, have some interest in the action, though it is not required that he be a contestant for the office. State v. Ritchie, 206 N. C. 808, 175 S. E. 308

Cited in Poole v. State Board of Cosmetic Art Examiners, 221 N. C. 199, 19

S. E. (2d) 635 (1942).

§ 88-14. Office in Raleigh; seal; officers and secretary.—The Board of Cosmetic Art Examiners shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. Said Board shall elect its own officers and in addition thereto shall elect a full-time secretary, which secretary shall receive an annual salary not to exceed one thousand and eight hundred dollars (\$1,800.00). The secretary shall keep and preserve all the records of the Board, issue all necessary notices and perform such other duties, clerical and otherwise, as may be imposed upon such secretary by said Board of Cosmetic Art Examiners. The secretary is hereby authorized and empowered to collect in the name and on behalf of said Board the fees prescribed by this chapter and shall turn over to the State Treasurer all funds collected or received under this chapter, which fund shall be credited to the Board of Cosmetic Art Examiners, and said funds shall be held and expended under the supervision of the Director of the Budget of the State of North Carolina exclusively for the administration and enforcement of the provisions of this chapter. The said secretary shall, before entering upon the duties of the office, execute a satisfactory bond with a duly licensed surety or other surety approved by the Director of the Budget, said bond to be in the penal sum of not less than ten thousand dollars (\$10,000.00), and conditioned upon the faithful performance of the duties of the office and the true and correct accounting of all funds received by such secretary by virtue of such office. Nothing in this chapter shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer, derived from fees and fines collected under the provisions of this chapter and received by the State Treasurer in the manner aforesaid. (1933, c. 179, s. 14; 1943, c. 354, s. 1.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 88-15. Compensation and expenses of Board members; inspectors; reports; budget; audit.—Each member of the Board of Cosmetic Art Examiners shall receive for such services an annual salary in an amount to be fixed by the Director of the Budget, and shall be reimbursed for actual necessary expenses incurred in the discharge of such duties, not to exceed five dollars (\$5.00) per day for subsistence, plus the actual traveling expenses, or an allowance of five cents (5c) per mile where such member uses his or her personally owned automobile.

Said Board, with the approval of the Director of the Budget, shall appoint necessary inspectors who shall be experienced in all branches of cosmetic art. The salaries for such inspectors shall be fixed by the Board with the approval of the Director of the Budget of the State of North Carolina. The inspectors or agents so appointed shall perform such duties as may be prescribed by the Board. Any inspector appointed under authority of this section or any member of the Board shall have the authority at all reasonable hours to examine cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies or training schools with respect to and in compliance with the provisions of this chapter. The inspectors and agents appointed under authority of this chapter shall make such reports to the Board of Cosmetic Art Examiners as said Board may require. The said Board shall, on or before June first of each year, submit a budget to the Director of the Budget for the ensuing fiscal year, which shall begin July first of each year. The said budget so submitted shall include all estimated receipts and expenditures for the ensuing fiscal year including the estimated compensation and expenses of Board members. The said budget shall be subject to the approval of the Director of the Budget and no expenditures shall be made unless the same shall have been set up in the budget adopted by the Board of Cosmetic Art Examiners, and approved by the Director of the Budget of the State of North Carolina; that all salaries and expenses in connection with the administration of this chapter shall be paid upon a warrant drawn on the State Treasurer, said warrants to be drawn by the secretary of the Board and approved by the State Auditor.

The provisions of the Executive Budget Act and the Personnel Act shall fully apply to the administration of this chapter.

There shall be annually made by the Auditor of the State of North Carolina a full audit and examination of the receipts and disbursements of the State Board of Cosmetic Art Examiners. The State Board shall report annually to the Governor a full statement of receipts and disbursements and also a full statement of its work during the year. (1933, c. 179, s. 15; 1935, c. 54, s. 3; 1941, c. 234, s. 2; 1943, c. 354, s. 2.)

Editor's Note.—The 1935 amendment amendment. And the 1943 amendment readded provisions relating to inspectors and wrote this section.

reports, which were rewritten by the 1941

- § 88-16. Applicants for examination.—Each applicant for an examination shall:
- (a) Make application to the Board of Cosmetic Art Examiners on blank forms prepared and furnished by the full-time secretary, such application to contain proof under the applicant's oath of the particular qualifications of the applicant.

- (b) Pay to the secretary of the said Board the required examination fee, hereinafter established.
- (c) All applications for said examination must be filed with the full-time secretary at least thirty days prior to the actual taking of such examination by applicant. (1933, c. 179, s. 16.)
- § 88-17. Regular and special meetings of Board; examinations.—The Board of Cosmetic Art Examiners shall meet four times a year in the months of January, April, July and October on the first Tuesday in each of said months, for the purpose of transacting all business of the Board of Cosmetic Art Examiners and to conduct examinations of applicants for certificates of registration to practice as registered cosmetologists, and of applicants for certificates of registration to practice as registered apprentices, meetings to be held at such places as the Board may determine to be most convenient for such examinations. The examinations conducted for applicants for certificates of registration as registered cosmetologists and registered apprentices shall be open to all applicants, and shall include such practical demonstration and oral and written tests as the said Board may determine. The chairman of the Board is hereby authorized and empowered to call a meeting of said Board whenever necessary, said meetings to be in addition to the quarterly meetings hereinbefore provided for. (1933, c. 179, s. 17; 1935, c. 54, s. 4.)

Editor's Note.—Prior to the 1935 amendment this section provided for at least sentence was added by the amendment.

- § 88-18. Certificate of registration.—Whenever the provisions of this chapter have been complied with, the said Board shall issue or cause to be issued, a certificate of registration as registered cosmetologist, or as a registered apprentice to the applicant, as the case may be. (1933, c. 179, s. 18.)
- § 88-19. Admitting operators from other states.—Persons who have practiced cosmetic art in another state and who move into this State shall prove and demonstrate his, or her fitness, physical and otherwise, as set out in §§ 88-10 and 88-12, to the Board of Cosmetic Art Examiners, as herein created, and as herein provided, before they will be issued a certificate of registration to practice cosmetic art, but said Board may issue such temporary permits as are necessary. (1933, c. 179, s. 19.)

§ 88-20. Registration procedure.—The procedure for the registration of

present practitioners of cosmetic art shall be as follows:

(a) Every person who has been practicing cosmetic art in North Carolina and who is practicing such art on June 30, 1933, upon making an affidavit to that effect, and complying with the provisions of this chapter as to physical fitness, and upon paying the required fee to the Board of Cosmetic Art Examiners shall be issued a certificate of registration as a registered cosmetologist.

(b) Any person who, on June 30, 1933, is operating a shop as a managing cosmetologist, shall, upon making an affidavit to that effect, and complying with the provisions of this chapter as to physical fitness and upon paying the required fee to the Board of Cosmetic Art Examiners be issued a certificate of registra-

tion as a managing cosmetologist.

(c) Any person who, on June 30, 1933, is regularly employed under a person who has registered as a managing cosmetologist shall be entitled to register as

a cosmetologist as provided in § 88-11.

(d) All persons who are not actively engaged in the practice of cosmetic art on June 30, 1933, shall be required to comply with all of the provisions of this chapter.

(e) All persons, however, who do not make application prior to January 1, 1942, shall be required to take the examination prescribed by the State Board of Cosmetic Art Examiners and otherwise comply with the provisions of this chap-

ter, as amended, before engaging in the practice of cosmetic art. (1933, c. 179, s. 20; 1941, c. 234, s. 3.)

Editor's Note.—The 1941 amendment

added subsection (e).

Paragraph (a) prescribes a mandatory duty, and the Board of Cosmetic Art Examiners has no discretionary power to refuse to issue the certificate in such instance, and therefore a complaint in suit

for mandamus alleging full compliance with the provisions of the statute in this respect and the refusal of the Board to issue the certificate to plaintiff, is not demurrable. Poole v. State Board of Cosmetic Art Examiners, 221 N. C. 199, 19 S. E. (2d) 635 (1942).

- § 88-21. Fees required. The fee to be paid by an applicant for a certificate of registration to practice cosmetic art as an apprentice shall be three dollars. The fee to be paid by an applicant for examination to determine his or her fitness to receive a certificate of registration as a registered cosmetologist shall be five dollars. The annual license fee of a registered cosmetologist shall be three dollars fifty cents, while the annual license fee of a registered apprentice shall be two dollars fifty cents. All licenses, both for apprentices and registered cosmetologists, shall be renewed as of the 30th day of June each and every year; such renewals for apprentices shall be two dollars fifty cents, and for registered cosmetologists three dollars fifty cents. The fees herein set out shall not be increased by the Board of Cosmetic Art Examiners, but said Board may regulate the payment of said fees and prorate the license fees in such manner as it deems expedient. The fee for registration of an expired certificate for a registered cosmetologist shall be five dollars and registration of an expired certificate of an apprentice shall be three dollars. (1933, c. 179, s. 21.)
- § 88-22. Persons exempt.—The following persons are exempt from the provisions of this chapter while engaged in the proper discharge of their professional duties:

(a) Persons authorized under the laws of the State to practice medicine and

surgery.

(b) Commissioned medical or surgical officers of the United States army, navy, or marine hospital services.

(c) Registered nurses.(d) Undertakers.

(e) Registered barbers.

(f) Manicurists as herein defined. (1933, c. 179, s. 22.)

§ 88-23. Rules and regulations of Board.—The State Board of Cosmetic Art Examiners shall have authority to make reasonable rules and regulations for the sanitary management of cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies and training schools, hereinafter called shops and schools, and to have such rules and regulations enforced. The duly authorized agents of said Board shall have authority to enter upon and inspect any shop or school at any time during business hours. A copy of the rules and regulations adopted by said Board and approved by the State Board of Health shall be furnished from the office of the Board or by the above mentioned authorized agents to the owner or manager of each shop or school in the State, and such copy shall be kept posted in a conspicuous place in each shop and school. (1933, c. 179, s. 23; 1935, c. 54, s. 5.)

Editor's Note.—The 1935 amendment

Editor's Note. — The 1935 amendment made this section applicable to academies and training schools.

§ 88-24. Posting of certificates.—Every holder of a certificate of registration shall display it in a conspicuous place adjacent to or near his, or her work chair. (1933, c. 179, s. 24.)

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§ 88-25. Annual renewal of certificates.—Every registered cosmetolo-

gist and every registered apprentice, who continues in active practice or service shall annually, on or before June 30th, of each year, file with the secretary of the Board, a renewal certificate as to physical fitness, renew his, or her certificate of registration which has not been renewed prior to, or during the month of July in any year, and which shall expire on the first day of August in that year. A registered cosmetologist, or a registered apprentice whose certificate of registration has expired may have his or her certificate restored immediately upon payment of the required restoration fee, and furnishing to the secretary of the Board renewal certificate as to physical fitness. Any registered cosmetologist who retires from the practice of cosmetic art for not more than three years may renew his or her certificate of registration upon payment of the required restoration fee, and by furnishing to the secretary of the Board renewal certificate as to physical fitness. (1933, c. 179, s. 25.)

§ 88-26. Causes for revocation of certificates.—The Board of Cosmetic Art Examiners may either refuse to issue or renew, or may suspend, or revoke any certificate of registration for any one, or combination of the following causes:

(a) Conviction of a felony shown by certified copy of the record of the

court of conviction.

(b) Gross malpractice, or gross incompetency, which shall be determined by the Board of Cosmetic Art Examiners.

(c) Continued practice by a person knowingly having an infectious, or contagious disease.

(d) Advertising by means of knowingly false, or deceptive statements.

(e) Habitual drunkenness, or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs.

(f) The commission of any of the offenses described in § 88-28, subsections

(c), (d), (f) and (g). (1933, c. 179, s. 26; 1941, c. 234, s. 4.)

Editor's Note. — The 1941 amendment words "three, four and six" formerly apsubstituted "(c), (d), (f) and (g)" for the pearing in subsection (f).

§ 88-27. Hearing on charges.—The Board may neither refuse to issue, nor refuse to renew, nor suspend, nor revoke any certificate of registration, however, for any of these causes, unless the person accused has been given at least thirty days' notice in writing of the charge against him or her and public hearing by the Board of Cosmetic Art Examiners.

(a) Upon the hearing of any such proceeding, the Board may administer oaths and may procure by its subpoena, the attendance of witnesses and the pro-

duction of relevant books and papers.

(b) Any cosmetologist in the State whose case has been passed upon by the Board of Cosmetic Art Examiners shall have the right to appeal to the superior court of the State, which court may in its discretion reverse, or modify any order made by the said Board of Cosmetic Art Examiners. (1933, c. 179, s. 27; 1939, c. 218, s. 1.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 88-28. Acts made misdemeanors.—Each of the following constitutes a misdemeanor punishable upon conviction by a fine of not less than \$10.00 and not more than \$50.00, or imprisonment for not less than ten days, or more than thirty days:

(a) The violation of any of the provisions of § 88-1.

(b) Permitting any person in one's employ, supervision, or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice.

(c) Permitting any person in one's employ, supervision, or control, to prac-

tice as a cosmetologist unless that person has a certificate as a registered cosmetologist.

- (d) Obtaining, or attempting to obtain, a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations.
 - (e) Practicing or attempting to practice by fraudulent misrepresentations.
- (f) The willful failure to display a certificate of registration as required by § 88-24.
- (g) The willful violation of the reasonable rules and regulations adopted by the State Board of Cosmetic Art Examiners and approved by the State Board of Health. (1933, c. 179, s. 28; 1949, c. 505, s. 2.)

Editor's Note.—The 1949 amendment re-

wrote subsection (g).

Variance.—Where defendant was tried upon a warrant charging that she permitted persons in her employ to practice as apprentices without certificate of registration as registered apprentices or registered cosmetologists, and the jury returned

a special verdict to the effect that defendant permitted unlicensed students to work in her school, there is a fatal variance between the warrant and the special verdict and a failure of proof, and the adjudication that defendant was not guilty is affirmed. State v. McIver, 216 N. C. 734, 6 S. E. (2d) 493 (1940).

§ 88-28.1. Restraining orders against persons engaging in illegal practices.—The State Board of Health and/or any county, city or district health officer and/or the State Board of Cosmetic Art Examiners, if it shall be found that any licensed cosmetologist or other person, who is subject to the provisions of this chapter, is violating any of the rules and regulations adopted by the State Board of Cosmetic Art Examiners, as approved by the State Board of Health, or any provisions of chapter 88, section 28, of the General Statutes of North Carolina, may, after notice to such person of such violation, apply to the superior court for a temporary or permanent restraining order to restrain such person from continuing such illegal practices. If, upon such application, it shall appear to the court that such person has violated and/or is violating any of the said rules and regulations or any provisions of chapter 88, section 28, of the General Statutes of North Carolina, the court may issue an order restraining any further violations thereof. All such actions for injunctive relief shall be governed by the provisions of article 37 of chapter 1 of the General Statutes: Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under any of the provisions of this chapter. (1949, c. 505, s. 1.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 407.

§ 88-29. Records to be kept by Board.—The Board of Cosmetic Art Examiners shall keep a record of its proceedings relating to the issuance, refusal, renewal, suspension and revocation of certificates of registration. This record shall also contain the name, place of business, and residence of each registered cosmetologist and registered apprentice, and the date and number of his certificate of registration. This record shall be open to public inspection during all days, excepting Sundays and legal holidays. (1933, c. 179, s. 29.)

Chapter 89.

Engineering and Land Surveying.

Sec.

\$ 89-1

89-1. Qualification to practice; registra-

89-2. Private practice.

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- 89-10. Expiration and renewal of certificates.
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- 89-15. Corporations and partnerships.

89-16. Land surveying.

- 89-17. Fees of surveyors and chain carriers.
- § 89-1. Qualification to practice; registration.—In order to safeguard life, health, and property, any person practicing or offering to practice engineering or land surveying in this State shall hereafter be required to submit evidence that he or she is qualified so to practice, and shall be registered as hereinafter provided; and from February 25, 1922, it shall be unlawful for any person to practice or to offer to practice engineering or land surveying in this State, except as herein provided, unless such person has been duly registered under the provisions of this chapter. (1921, c. 1, s. 1; C. S., s. 6055(b).)
- § 89-2. Private practice.—Nothing in this chapter shall be construed as requiring registration for the purpose of practicing engineering or land surveying by an individual, firm, or corporation on property owned or leased by said individual, firm, or corporation, unless the same involves the public safety or health. (1921, c. 1, s. 2; C. S., s. 6055(c).)
- § 89-3. State Board of Registration for Engineers and Land Surveyors.—There is hereby created a State Board of Registration for Engineers and Land Surveyors, hereinafter called the "Board," consisting of five members, who shall be appointed by the Governor within sixty days after this chapter becomes effective. At least two members of such Board shall be appointed from the engineering faculty of the North Carolina State College of Agriculture and Engineering of the University of North Carolina. Not more than three members of said Board shall be from the same branch of the profession of engineering. The members of the first Board shall be appointed to serve for the following terms: Two members for one year, two members for two years, and one member for four years; said terms ending on the thirty-first day of December of the succeeding year. On the expiration of each of said terms the term of office of each newly appointed or reappointed member of the Board shall be for a period of four years and shall terminate on the thirty-first day of December. Each member shall hold over after the expiration of his term until his successor shall be duly appointed and qualified. The Governor may remove any member of the Board for misconduct, incompetency, or neglect of duty. Vacancies in the membership of the Board, however created, shall be filled by appointment by the Governor for the unexpired term. (1921, c. 1, s. 3; C. S., s. 6055(d).)

- § 89-4. Requisites for appointment; pay.—Each member of the Board shall be a citizen of the United States and a resident of this State at the time of his appointment. He shall have been engaged in the practice or teaching of his profession for at least ten years. Each member of the Board shall receive ten dollars (\$10) per day for attending sessions of the Board or of its committees, and for the time spent in necessary travel, and, in addition, shall be reimbursed for all necessary traveling, incidental, and clerical expenses incurred in carrying out the provisions of this chapter. (1921, c. 1, s. 4; C. S., s. 6055(e).)
- § 89-5. Certificate of appointment; oath; certificate of registration; seal; bylaws.—Each member of the Board shall receive a certificate of appointment from the Governor, and before beginning his term of office he shall file with the Secretary of State the constitutional oath of office. Each member of the Board first created shall receive a certificate of registration under this chapter from the Governor of the State. The Board shall have power to compel the attendance of witnesses, may administer oaths and may take testimony and proofs concerning all matters within its jurisdiction. The Board shall adopt and have an official seal, which shall be affixed to all certificates of registration granted; and shall make all bylaws and rules not inconsistent with law, needed in performing its duty. (1921, c. 1, s. 5; C. S., s. 6055(f).)
- § 89-6. Meetings; notice; quorum.—The Board shall hold a meeting within thirty days after its members are first appointed, and thereafter shall hold at least two regular meetings each year. Special meetings shall be held at such times as the bylaws of the Board may provide. Notice of all meetings shall be given in such manner as the bylaws may provide. The Board shall elect annually from its members a chairman, a vice-chairman, and a secretary. A quorum of the Board shall consist of not less than three members. (1921, c. 1, s. 6; C. S., s. 6055(g).)
- § 89-7. Fund of Board; bond of secretary of Board.—The secretary of the Board shall receive and account for all moneys derived from the operation of this chapter and shall pay them to the State Treasurer, who shall keep such moneys in a separate fund, to be known as the "Fund of the Board of Registration for Engineers and Land Surveyors," which fund shall be continued from year to year, and shall be drawn against only for the purpose of this chapter as herein provided. All expenses certified by the Board as properly and necessarily incurred in the discharge of its duties, including authorized compensation, shall be paid out of said fund on the warrant of the Auditor of the State, issued on requisition signed by the chairman and secretary of the Board: Provided, however, that at no time shall the total of warrants issued exceed the total amount of funds accumulated under this chapter. The secretary of the Board shall give a surety bond satisfactory to the State Treasurer, conditioned upon the faithful performance of his duties. The premium on said bond shall be regarded as a proper and necessary expense of the Board. (1921, c. 1, s. 7; C. S., s. 6055(h).)
- § 89-8. Record of proceedings and register of applicants; roster of engineers and surveyors; annual report.—The Board shall keep a record of its proceedings and a register of all applicants for registration showing for each the date of application, name, age, education and other qualifications, place of business and place of residence, and whether the applicant was rejected or a certificate of registration granted, and the date of such action. The books and register of the Board shall be prima facie evidence of all matters recorded therein. A roster showing the names and places of business and of residence of all registered engineers and land surveyors shall be prepared by the secretary of the Board during the month of January of each year; such roster shall be printed by the Board out of the fund of the said Board as provided in § 89-7, and a copy mailed to and placed on file by the clerk of each incorporated city, town and county in the

State. On or before the first day of March of each year the Board shall submit to the Governor a report of its transactions for the preceding year, and shall file with the Secretary of State a copy of such report, together with a complete statement of the receipts and expenditures of the Board, attested by the affidavits of the chairman and the secretary, and a copy of the said roster of registered engineers and registered surveyors. (1921, c. 1, s. 8; C. S., s. 6055(i).)

§ 89-9. Certificates; issuance; fees; eligibility of applicants.—The Board shall, on application therefor, on prescribed form, and the payment of a fee of twenty-five dollars (\$25) by engineers, or the payment of a fee of ten dollars (\$10) by land surveyors, issue a certificate of registration:

(1) To any person who submits evidence satisfactory to the Board that he or she is fully qualified to practice engineering, or land surveying, such evidence after January first, one thousand nine hundred and twenty-three, to include an ex-

amination, oral or written; or

(2) To any person who holds a like unexpired certificate of registration issued to him or her by proper authority in any state or territory of the United States in which the requirements for the registration of engineers or land surveyors are of a standard satisfactory to the Board: Provided, however, that the engineering registration board of said states or territories shall grant full and equal reciprocal registration rights and privileges to North Carolina registrants: Provided, however, that no person shall be eligible for registration who is under twenty-one years of age, who is not a citizen of the United States, who does not speak and write the English language, who is not of good character and repute.

Unless disqualifying evidence be before the Board, the following facts established in the application shall be regarded as prima facie "evidence satisfactory to the Board," that the applicant is fully qualified to practice engineering or land sur-

veying, or both:

(a) Five (5) or more years of active engagement in engineering, or three or more years active practice in land surveying, February 25, 1921: Provided, however, each year of teaching, or of study satisfactorily completed, in a college of standing satisfactory to the Board shall be considered as equivalent to one year of such active practice: Provided further, the period spent in the army, navy, marine corps, or other government service of the United States in the late war by any student whose engineering education was interrupted by such services shall also be counted as equivalent to an equal period of active practice: Provided, however, application for registration is made within twelve (12) months after February 25, 1921.

(b) Graduation, after a course of not less than four (4) years, in engineering

from a school or college approved by the Board as of satisfactory standing.

(c) Full membership in the American Society of Civil Engineers, American Institute of Chemical Engineers, American Institute of Electrical Engineers, American Society of Mechanical Engineers, American Institute of Mining and Metallurgical Engineers, American Society of Naval Architects and Marine Engineers, or such other national or State engineering or architectural societies as may be approved by the Board, the requirements for full membership of which are not lower than the requirements for full membership in the professional societies or institutes named above.

Applicants for registration, in cases where the evidence originally presented in the application does not appear to the Board conclusively or warranting the issuance of a certificate, may present further evidence which may include the

results of a required examination, for the consideration of the Board.

In case the Board denies the issuance of a certificate to an applicant, the registration fee deposited shall be returned by the Board to the applicant. (1921, c. 1, s. 9; C. S., s. 6055(j).)

Local Modification.—Macon: Pub. Loc. 1927, c. 657.

- § 89-10. Expiration and renewal of certificates.—Certificates of registration shall expire on the last day of the month of December following their issuance or renewal, and shall become invalid on that date unless renewed. It shall be the duty of the secretary of the Board to notify by mail every person registered hereunder of the date of the expiration of his certificate and the amount of the fee required for its renewal for one year; such notice shall be mailed at least one month in advance of the date of the expiration of said certificate. Renewal may be effected at any time during the month of January by the payment of a fee of five dollars (\$5) to the secretary of the Board. The failure on the part of any registrant to renew his certificate annually in the month of January, as required above, shall not deprive such person of the right of renewal thereafter, but the fee paid for the renewal of a certificate after the month of January shall be increased ten per cent for each month or fraction of a month that payment for renewal is delayed: Provided, however, that the maximum fee for a delayed renewal shall not exceed twice the normal fee. (1921, c. 1, s. 9; C. S., s. 6055(k).)
- 89-11. Revocation of license; reissue of revoked license; reinstatement; lost certificate.—The Board shall have the power to revoke the certificate of registration of any engineer or land surveyor registered hereunder who is found guilty of any fraud or deceit in obtaining a certificate of registration, or gross negligence, incompetency or misconduct in the practice of engineering or land surveying. Any person may prefer charges of such fraud, deceit, negligence, incompetency or misconduct against any engineer or land surveyor registered hereunder; such charges shall be in writing and sworn to by the complainant and submitted to the Board. Such charges, unless dismissed without hearing by the Board as unfounded or trivial, shall be heard and determined by the Board within three (3) months after the date on which they are preferred. Hearings shall be in the county of the residence of the person whose license is involved; provided that after notice such person and the Board may agree that the hearing may be held in some other county. A copy of the charges, together with a notice of the time and place of hearing, shall be legally served on the accused at least thirty (30) days before the date fixed for the hearing, and in the event that such service cannot be effected thirty (30) days before such hearing, then the date of hearing and determination shall be postponed as may be necessary to permit the carrying out of this condition. At said hearing the accused shall have the right to appear personally and by counsel, and to cross-examine witnesses against him or her and to produce evidence or witnesses in his or her defense. If after said hearing the Board unanimously votes in favor of finding the accused guilty of any fraud or deceit in obtaining the certificate or of gross negligence, incompetency, or misconduct in the practice of engineering or land surveying, the Board shall revoke the certificate of registration of the accused. The Board may reissue a certificate of registration to any person whose certificate has been revoked: Provided, three or more members of the Board vote in favor of such reissuance for reasons the Board may deem sufficient. The Board shall immediately notify the Secretary of State and the clerk of each incorporated city, town or county in the State of its findings in the case of the revocation of a certificate of registration or of its reissuance of a revoked certificate of registration. A new certificate of registration to replace any certificate lost, destroyed or mutilated may be issued, subject to the rules and regulations of the Board. (1921, c. 1, s. 10; C. S., s. 6055(1); 1939, c. 218, s. 2.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 89-12. Evidence carried by certificate; seal of registrant.—The issuance of a certificate of registration by the Board shall be evidence that the person named therein is entitled to all the rights and privileges of a registered

engineer or registered land surveyor, or both, while the said certificate remains unrevoked or unexpired. Each registrant hereunder shall, upon registration, obtain a seal of the design authorized by the Board, bearing the registrant's name and the legend "registered engineer," or "registered land surveyor." Plans, specifications, plats and reports issued by a registrant shall be stamped with said seal during the life of registrant's certificate, but it shall be unlawful for anyone to stamp or seal any document or documents with said seal after the certificate of the registrant named thereon has expired or has been revoked unless said certificate has been renewed or reissued. (1921, c. 1, s. 11; C. S., s. 6055(m).)

- § 89-13. Acts declared misdemeanors; punishment. Any person, who, after February 25, 1922, is not legally authorized to practice engineering or land surveying in this State, according to the provisions of this chapter, and shall practice or offer to practice engineering or land surveying in this State, except as provided in §§ 89-14 and 89-16, and any person presenting or attempting to file as his own the certificate of registration of another, or who shall give false or forged evidence of any kind to the Board, or to any member thereof, in obtaining a certificate of registration, or who shall falsely impersonate any other practitioner, of like or different name, or who shall use an expired or revoked certificate of registration, shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than one hundred dollars (\$100) or by imprisonment for three (3) months, or by both fine and imprisonment, in the discretion of the court. (1921, c. 1, s. 12; C. S., s. 6055(n).)
- § 89-14. Exemptions from operation of chapter.—The following shall be exempted from the provisions of this chapter:

(a) Any person or persons offering to practice in this State, as an engineer or land surveyor, not a resident of and having no established place of business in this State.

(b) Practice as an engineer or land surveyor in this State by any person not a resident of this State, and having no established place of business in this State, when this practice does not aggregate more than thirty (30) days in any calendar year: Provided, that said person is legally qualified for such professional service

in his own state or country.

(c) Practice as an engineer or land surveyor in this State by any person not a resident of this State and having no established place of business in this State, or any person resident in this State but whose arrival in the State is recent: Provided, however, such person shall have filed an application for registration as an engineer or land surveyor and shall have paid the fee provided for in § 89-9. Such exemption shall continue for only such reasonable time as the Board requires in which to consider and grant or deny the said application for registration.

(d) Engaging in engineering and land surveying work as an employee, or assistant, of a registered engineer or a registered land surveyor, or as an employee or assistant of a nonresident engineer or a nonresident land surveyor, provided for in paragraphs (b) and (c) of this section, provided that said work as an

employee may not include responsible charge of design or supervision.

(e) Practice of engineering or land surveying by any person not a resident of and having no established place of business in this State, as a consulting associate or an architect, engineer or a land surveyor registered under the provisions of this chapter: Provided, the nonresident is qualified for such professional service in his own state or country.

(f) Practice of engineering and land surveying solely as an officer or as an

employee of the United States. (1921, c. 1, s. 13; C. S., s. 6055(o).)

§ 89-15. Corporations and partnerships.—A corporation or partnership may engage in the practice of engineering or land surveying in this State: Provided, the person or persons connected with such corporation or partnership in charge

of the designing or supervision which constitutes such practice is or are registered as herein required of engineers and land surveyors. The same exemptions shall apply to corporations and partnerships as apply to individuals under this chapter. (1921, c. 1, s. 14; C. S., s. 6055(p).)

§ 89-16. Land surveying.—Land surveying as covered by this chapter refers only to surveys for the determination of areas, or for the establishment or re-establishment of land boundaries and the subdivision and platting of land, and making plats, maps, and drawing descriptions of the lands or lines so surveyed, platted or investigated. Nothing in this chapter shall be construed as prohibiting a duly qualified registered engineer from making land surveys; nor as prohibiting any person from doing land surveying provided he does not represent himself to be a registered land surveyor. (1921, c. 1, s. 15; C. S., s. 6055(q).)

Local Modification.—Cumberland: 1937, c. 110.

§ 89-17. Fees of surveyors and chain carriers.—Surveyors appointed by courts to survey any lands the boundaries of which may come in question in any suit or proceeding pending therein, or called upon by the commissioners to assist in surveying and dividing the lands of intestates or others, held in common, shall receive the following fees, and no other, namely: For every survey on an entry containing three hundred acres or less, one dollar and sixty cents, and for every hundred more than that quantity, forty cents; for surveying lands in dispute, by order of court, traveling to and from the place, and performing the duty, two dollars per day, or such greater sum as the court may allow; for assisting in surveying and dividing the lands of intestates, or others, held in common, when called upon by the commissioners appointed to make partition, or in laying off dower, traveling to and from the place, and performing the duty, two dollars per day. For assisting in surveying and allotting the homestead exemption of any person when summoned to do so by the sheriff or other lawful officer, for traveling to and from the place and performing the duty, two dollars per day, which shall be taxed in the bill of costs. In all surveys made by order of the court, the chain carriers shall be allowed such compensation as the court may determine, not exceeding one dollar each per day; and in matters of disputed boundary, which may come in question, in any suit, the court may make to the surveyor such allowance for plots as it may deem reasonable, which, with the allowance to chain carriers, shall be taxed as costs. (Code, s. 3754; 1893, c. 58, s. 2; 1905, cc. 182, 263; Rev., s. 2802; C. S., s. 3921.)

Local Modification.—Cabarrus: 1935, c. ing and indexing surveys for State lands, see § 146-42.

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ARTICLE 1.

Practice of Medicine.

- § 90-1. North Carolina Medical Society incorporated.—The association of regularly graduated physicians, calling themselves the State Medical Society, is hereby declared to be a body politic and corporate, to be known and distinguished by the name of The Medical Society of the State of North Carolina. (1858-9, c. 258, s. 1; Code, s. 3121; Rev., s. 4491; C. S., s. 6605.)
- § 90-2. Board of Examiners.—In order to properly regulate the practice of medicine and surgery, there shall be established a board of regularly graduated physicians, to be known by the title of The Board of Medical Examiners of the State of North Carolina, which shall consist of seven regularly graduated physicians. (1858-9, c. 258, ss. 3, 4; Code, s. 3123; Rev., s. 4492; C. S., s. 6606; Ex. Sess. 1921, c. 44, s. 1.)
- § 90-3. Medical Society appoints Board.—The Medical Society shall have power to appoint the Board of Medical Examiners. (1858-9, c. 258, s. 9: Code, s. 3126; Rev., s. 4493; C. S., s. 6607.)
- § 90-4. Board elects officers and fills vacancies.—The Board of Medical Examiners is authorized to elect all such officers and to frame all such bylaws as may be necessary, and in the event of any vacancy by death, resignation, or otherwise, of any member of said Board, the Board, or a quorum thereof, is empowered to fill such vacancy. (1858-9, c. 258, s. 11; Code, s. 3128; Rev., s. 4494; C. S., s. 6608.)
- § 90-5. Meetings of Board.—The Board of Medical Examiners may assemble once in every year in the city of Raleigh, and shall remain in session from day to day until all applicants who may present themselves for examination within the first two days of this meeting have been examined and disposed of; other meetings in each year may be held at some suitable point in the State if deemed advisable. (Rev., s. 4495; 1915, c. 220, s. 1; C. S., s. 6609; 1935, c. 363.)

Editor's Note.—The 1935 amendment substituted the word "may" for the word "shall" near the beginning of this section.

- § 90-6. Regulations governing applicants for license, examinations, etc.—The Board of Medical Examiners is empowered to prescribe such regulations as it may deem proper, governing applicants for license, admission to examinations, the conduct of applicants during examinations, and the conduct of examinations proper. (C. S., s. 6610; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 2.)
- § 90-7. Bond of secretary.—The secretary of the Board of Medical Examiners shall give bond with good surety, to the president of the Board, for the safekeeping and proper payment of all moneys that may come into his hands. (1858-9, c. 258, s. 17; Code, s. 3134; Rev., s. 4497; C. S., s. 6611.)
- § 90-8. Officers may swear applicants and summon witnesses.—The president and secretary of the Board of Medical Examiners of this State shall

have power to administer oaths to all persons who may apply for examination before the Board, or to any other persons deemed necessary in connection with performing the duties of the Board as imposed by law. The Board shall have power to summon any witnesses deemed necessary to testify under oath in connection with any cause to be heard before it; or to summon any licentiate against whom charges are preferred in writing, and the failure of the licentiate, against whom charges are preferred, to appear at the stated time and place to answer to the charges, after due notice or summons has been served in writing, shall be deemed a waiver of his right to said hearing, as provided in § 90-14. (1913, c. 20, s. 7; C. S., s. 6612; Ex. Sess. 1921, c. 44, s. 3.)

§ 90-9. Examination for license; scope; conditions and prerequisites. -It shall be the duty of the Board of Medical Examiners to examine for license to practice medicine or surgery, or any of the branches thereof, every applicant who complies with the following provisions: He shall, before he is admitted to examination, satisfy the Board that he has an academic education equal to the entrance requirements of the University of North Carolina, or furnish a certificate from the superintendent of public instruction of the county that he has passed an examination upon his literary attainments to meet the requirements of entrance in the regular course of the State University. He shall exhibit a diploma or furnish satisfactory proof of graduation from a medical college in good standing requiring an attendance of not less than four years, and supplying such facilities for clinical and scientific instruction as shall meet the approval of the Board; but the requirement of four years' attendance at a school shall not apply to those graduating prior to January the first, nineteen hundred.

The examination shall cover the following branches of medical science: anatomy, embryology, histology, physiology, pathology, bacteriology, surgery, pediatrics. medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics,

gynecology, and the practice of medicine.

If on such examination the applicant is found competent, the Board shall grant him a license authorizing him to practice medicine or surgery or any of the branches thereof.

Five members of the Board shall constitute a quorum, and four of those present shall be agreed as to the qualification of the applicant. (Rev., s. 4498; 1913, c. 20, ss. 2, 3, 6; C. S., s. 6613; 1921, c. 47, s. 1.)

statute is not in violation of the State Constitution is held in State v. Vandoran, 109 N. C. 864, 14 S. E. 32 (1891). It is not to be questioned that the lawmaking power of the State has the right to require an

Constitutional Discrimination.—That the examination and certificate as to the competency of persons desiring to practice law or medicine. State v. Call, 121 N. C. 643, 28 S. E. 517 (1897); State v. Siler, 169 N. C. 314, 84 S. E. 1015 (1915).

90-10. Two examinations, preliminary and final, allowed.—It shall be the duty of the State Board of Medical Examiners to examine any applicant for license to practice medicine on the subjects of anatomy, histology, physiology, bacteriology, embryology, pathology, medical hygiene, and chemistry, upon his furnishing satisfactory evidence from a medical school in good standing, and supplying such facilities for anatomical and laboratory instruction as shall meet with the approval of the Board, that he has completed the course of study in the school upon the subjects mentioned. The Board shall set to the credit of such applicant upon its record books the grade made by him upon the examination, which shall stand to the credit of such applicant; and when he has subsequently completed the full course in medicine and presents a diploma of graduation from a medical college in good standing, requiring a four years' course of study of medicine for graduation, and when he has completed the examination upon the further branches of medicine, to wit, pharmacy, materia medica, therapeutics, obstetrics, gynecology, pediatrics, practice of medicine and surgery, he shall have accounted to his credit the grade made upon the former examination, and if then upon such completed

examination he be found competent, said Board shall grant him a license to practice medicine and surgery, and any of the branches thereof. (C. S., s. 6614; 1921, c. 47, s. 2; Ex. Sess. 1921, c. 44, s. 4.)

- § 90-11. Qualification of applicant for license.—Every person making application for a license to practice medicine or surgery in the State shall be not less than twenty-one years of age, and of good moral character, before any license can be granted by the Board of Medical Examiners: Provided, that the age requirement shall not apply to students taking the examinations of the first two years in medicine. (C. S., s. 6615; 1921, c. 47, s. 3; Ex. Sess. 1921, c. 44, s. 5.)
- § 90-12. Limited license.—The Board may, whenever in its opinion the conditions of the locality where the applicant resides are such as to render it advisable, make such modifications of the requirements of the preceding sections, both as to application for examination and examination for license, as in its judgment the interests of the people living in that locality may demand, and may issue to such applicant a special license, to be entitled a "Limited License," authorizing the holder thereof to practice medicine and surgery within the limits only of the districts specifically described therein. The holder of the limited license practicing medicine or surgery beyond the boundaries of the district as laid down in said license shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than fifty dollars for each and every offense; and the Board is empowered to revoke such limited license, in its discretion, after due notice. The clerk of the superior court, in registering the holder of a limited license, shall copy upon the certificate of registration and upon his record the description of the district given in the license. (1909, c. 218, s. 1; C. S., s. 6616.)
- § 90-13. When license without examination allowed.—The Board of Medical Examiners shall in their discretion issue a license to any applicant to practice medicine and surgery in this State without examination if said applicant exhibits a diploma or satisfactory proof of graduation from a medical college in good standing, requiring an attendance of not less than four years and a license issued to him to practice medicine and surgery by the Board of Medical Examiners of another state. (1907, c. 890; 1913, c. 20, s. 3; C. S., s. 6617.)
- 90-14. Board may rescind license.—The Board shall have the power to revoke and rescind any license granted by it, when, after due notice and hearing, it shall find that any physician licensed by it has been guilty of grossly immoral conduct, or of producing or attempting to produce a criminal abortion, or, by false and fraudulent representations, has obtained or attempted to obtain, practice in his profession, or is habitually addicted to the use of morphine, cocaine or other narcotic drugs, or has by false or fraudulent representations of his professional skill obtained, or attempted to obtain, money or anything of value, or has advertised or held himself out under a name other than his own, or has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he holds a license, or is guilty of any fraud or deceit by which he was admitted to practice, or has been guilty of any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession, or has been convicted in any court, state or federal, of any felony or other criminal offense involving moral turpitude. Upon the hearing before said Board of any charge involving a conviction of such felony or other criminal offense, a transcript of the record thereof certified by the clerk of the court in which such conviction is had, shall be sufficient evidence to justify the revocation or rescinding of such license. The findings and action of said Board shall, in all such cases and hearings, be final and conclusive. And, for any of the above reasons, the said Board of Medical Examiners may refuse to issue a license to an applicant. The said Board of Medical Examiners may, in its discretion, restore a license so revoked and rescinded, upon due notice being given and hear-

ing had, and satisfactory evidence produced of reformation of the licentiate. (C. S., s. 6618; 1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32.)

Editor's Note.—The 1933 amendment rewrote this section.

Unprofessional Conduct.—While the Board does not have the power to revoke a license on the sole ground that the holder thereof has been convicted of the violation of a criminal statute in force in the State or in the United States, the Board has the power to revoke a license upon a finding that the holder thereof was guilty of unprofessional conduct in that he had violated the provisions of the statute. Board of Medical Examiners v. Gardner, 201 N.

C. 123, 159 S. E. 8 (1931).

Appeal.—The appeal from the State Board of Medical Examiners allowed to a physician whose license has been revoked for immoral conduct in the practice of his profession, follows the procedure allowed in analogous cases, and the intent of the legislature is interpreted to give a trial de novo in the superior court wherein the jury are to decide upon the evidence adduced before them the facts involved in the issue. State v. Carroll, 194 N. C. 37, 138 S. E. 339 (1927).

90-15. License fee; salaries, fees, and expenses of Board.—Each applicant for examinations shall pay to the treasurer of the Board of Medical Examiners of the State of North Carolina a fee of fifteen dollars (\$15) before being admitted to the examination: Provided, however, that in the case of applicants taking the examinations in two halves, as provided in § 90-10, the fee shall be seven and one-half dollars (\$7.50) for each of the two half examinations. Whenever any license is granted without examination, as authorized in § 90-13, the applicant shall pay to the treasurer of the Board a fee of fifty dollars (\$50). Whenever a limited license is granted, as provided in § 90-12, the person shall pay to the treasurer of the Board a fee of fifteen dollars (\$15). A fee of five dollars (\$5) shall be paid for each duplicate license. All fees shall be paid in advance to the treasurer of the Board of Medical Examiners of the State of North Carolina, to be by him held as a fund for the use of said Board. The compensation and expenses of the members and officers of said Board, and all expenses proper and necessary in the opinion of said Board, to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of such funds, upon the warrant of the president and secretary of said Board. The salaries and fees of the officers and members of the said Board shall be fixed by the Board, but shall not exceed ten dollars (\$10) per day per member, and railroad fare and hotel expenses; and no expense shall be created to exceed the income from fees herein provided. Any unexpended sum or sums of money remaining in the treasury of the said Board at the expiration of the terms of office of the members thereof, shall be paid over to their successors after their election and qualification as such. (1858-9, c. 258, s. 13; Code, s. 3130; Rev., s. 4501; 1913, c. 20, ss. 4, 5; C. S., s. 6619; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7.)

§ 90-16. Board to keep record; publication of names of licentiates; transcript as evidence.—The Board of Examiners shall keep a regular record of its proceedings in a book kept for that purpose, together with the names of the members of the Board present, the names of the applicants for license, and other information as to its actions. The Board of Examiners shall cause to be entered in a separate book the name of each applicant to whom a license is issued to practice medicine or surgery, along with any information pertinent to such issuance. The Board of Examiners shall publish the names of those licensed in three daily newspapers published in the State of North Carolina, within thirty days after granting the same. A transcript of any such entry in the record books, or a certificate that there is not entered therein the name and proficiency or date of granting such license of a person charged with the violation of the provisions of this article, certified under the hand of the secretary and the seals of the Board of Medical Examiners of the State of North Carolina, shall be admitted as evidence in any court of this State when it is otherwise competent. (1858-9, c. 258, s. 12; Code, s. 3129; Rev., s. 4500; C. S., s. 6620; 1921, c. 47, s. 6.)

- § 90-17. Blanks furnished clerk.—It shall be the duty of the Medical Society of the State of North Carolina to prescribe proper forms of certificates required by this article and all such blanks and forms as the clerk may need to enable him to perform his duties under this article. (1889, c. 181, s. 7; 1899, c. 93, s. 4; Rev., s. 4505; C. S., s. 6621.)
- § 90-18. Practicing without license; practicing defined; penalties. -No person shall practice medicine or surgery, or any of the branches thereof. nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do in the manner provided in this article, and if any person shall practice medicine or surgery without being duly licensed and registered, as provided in this article, he shall not be allowed to maintain any action to collect any fee for such services. The person so practicing without license shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars (\$50) nor more than one hundred dollars (\$100), or imprisoned at the discretion of the court for each and every offense.

Any person shall be regarded as practicing medicine or surgery within the meaning of this article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to. or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another person: Provided, that the following cases shall not

come within the definition above recited:

1. The administration of domestic or family remedies in cases of emergency. 2. The practice of dentistry by any legally licensed dentist engaged in the practice of dentistry and dental surgery.

3. The practice of pharmacy by any legally licensed pharmacist engaged in the

practice of pharmacy.

- 4. The practice of medicine and surgery by any surgeon or physician of the United States army, navy, or public health service in the discharge of his official duties.
- 5. The treatment of the sick or suffering by mental or spiritual means without the use of any drugs or other material means.

6. The practice of optometry by any legally licensed optometrist engaged in the

practice of optometry.

7. The practice of midwifery by any woman who pursues the vocation of midwife.

8. The practice of chiropody by any legally licensed chiropodist when engaged

in the practice of chiropody, and without the use of any drug.

9. The practice of osteopathy by any legally licensed osteopath when engaged

in the practice of osteopathy as defined by law, and especially § 90-129.

10. The practice of chiropractic by any legally licensed chiropractor when engaged in the manual adjustment of the twenty-four spinal vertebrae of the human body and without the use of drugs.

11. The practice of medicine or surgery by any reputable physician or surgeon in a neighboring state coming into this State for consultation with a resident registered physician. This proviso shall not apply to physicians resident in a neighboring state and regularly practicing in this State.

12. Physicians who have a diploma from a regular medical college or were practicing medicine and surgery in this State prior to the seventh day of March, one thousand eight hundred and eighty-five, and who are properly registered as

required by law.

13. Any person practicing radiology as hereinafter defined shall be deemed to be engaged in the practice of medicine within the meaning of this article. "Radiology" shall be defined as, that method of medical practice in which demonstration and examination of the normal and abnormal structures, parts or functions of the human body are made by use of X-rays. Any person shall be regarded as engaged in the practice of radiology who makes or offers to make, for a consideration, a demonstration or examination of a human being or a part or parts of a human body by means of fluoroscopic exhibition or by the shadow imagery registered with photographic materials and the use of X-rays; or holds himself out to diagnose or able to make or makes any interpretation or explanation by word of mouth, writing or otherwise of the meaning of such fluoroscopic or registered shadow imagery of any part of the human body by use of X-rays; or who treats any disease or condition of the human body by the application of X-rays or radium. Nothing in this subsection shall prevent the practice of radiology by any person licensed under the provisions of articles 2, 7, 8, and 12 of this chapter. (1858-9, c. 258, s. 2; Code, s. 3122; 1885, c. 117, s. 2; c. 261; 1889, c. 181, ss. 1, 2; Rev., ss. 3645, 4502; C. S., s. 6622; 1921, c. 47, s. 7; Ex. Sess. 1921, c. 44, s. 8; 1941, c. 163.)

Editor's Note.—The 1921 amendments rewrote this section, and the 1941 amendment added subsection 13.

Before this section was amended in 1921 it provided that an unlicensed practitioner could not maintain an action to collect fees for services. In Puckett v. Alexander, 102 N. C. 95, 8 S. E. 767 (1889), it was held that one not licensed to practice could not collect for service. The contract for services in such case was entered into before the act of 1885 which allowed one who graduated from a medical college before 1880 to practice.

Validity.—This statute is not invalid, as it is the exercise of police power to protect the public, and is not the creation of a monopoly. State v. Call, 121 N. C. 643, 28 S. E. 517 (1897).

Nonmedical Physicians.—The statute is applicable only to one holding himself out as a medical physician. If one cures by other means he is not subject to this statute. State v. Biggs, 133 N. C. 729, 46 S. E. 401 (1903).

A patent medicine vendor cannot hold himself out as a physician, and then avoid the statute by only prescribing his own products. State v. Van Doran, 109 N. C. 864, 14 S. E. 32 (1891).

The distinction between the practice of osteopathy and the practice of medicine and surgery is recognized by articles 1 and 7 of this chapter. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

The legislature has denied to a licensed osteopath the privilege of using drugs in his practice. It necessarily follows that he exceeds the limits of his certificate and is guilty of practicing medicine without being licensed so to do within the purview of this section if he administers or prescribes drugs in treating the ailments of his patients. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948). See § 90-129 and note.

But he is not guilty of practicing medicine without a license in administering violet ray treatments to his patients suffering with skin diseases. Subsection 13 specifically confers upon him the privilege of practicing radiology. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

A person administers drugs when he gives or applies drugs to a patient. Thus, the giving of a hypodermic injection of a drug is administering a drug. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

Or Gives Oral Directions for Their Use or Application.—The giving of oral directions by an osteopath to his patient directly, or indirectly by telephone directions to the druggist, for the use or application by the patient of recommended remedies, is prescribing drugs. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

Meaning of "Drugs."—In so far as the practice of osteopathy is concerned, a "drug" is any substance used as a medicine or in the composition of medicines for internal or external use, and a "medicine" is any substance or preparation used in treating disease. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

The Narcotic Drug Act does not furnish the criterion for determining the meaning of "drugs" in relation to the practice of medicine without a license. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

Laxatives and tonics are "drugs" in so far as the practice of osteopathy is concerned. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

Also Patent or Proprietary Remedies.—A person who holds himself out as an expert in medical affairs and prescribes drugs for his patients and charges fees for so doing practices medicine notwithstanding the drugs are patent or proprietary remedies purchasable without a prescription, and notwithstanding the fact that the recommendation of such remedies to acquaintances without the charge of a fee would not be unlawful. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

Canned Milk Is Not a Drug.—An osteopath does not practice medicine in advising a client to feed her baby a designated brand of canned milk, since milk is a food and not a drug. State v. Baker, 229 N.

C. 73, 48 S. E. (2d) 61 (1948).

Whether a vitamin preparation is a drug or a food is ordinarily a question of fact. The same substance may be a drug under one set of circumstances, and not a drug under another. The test is whether it is administered or employed as a medicine. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948), wherein for the purpose of the particular case it was assumed that vitamin preparations were used solely for nourishment, and that the defendant did not transgress the scope of his osteopathic certificate in urging their use by his patients.

§ 90-19. Practicing without registration; penalties.—Any person desiring to engage in the practice of medicine or surgery shall personally appear before the clerk of the superior court of the county in which he resides or practices, for registration as a physician or surgeon. The person so applying shall produce and exhibit before the clerk of the superior court a license obtained from the Board of Medical Examiners of the State. The clerk shall thereupon register the date of registration, with the name and residence of such applicant, in a book to be kept for this purpose in his office marked "Register of Physicians and Surgeons," and shall issue to him a certificate of registration under the seal of the superior court of the county upon the form furnished him by the Medical Society of North Carolina, for which the clerk shall be entitled to collect from said applicant a fee of twenty-five cents. The person obtaining such certificate shall be entitled to practice medicine or surgery, or both, in the county where the same was obtained, and in any other county in this State; but if he shall remove his residence to another county he shall exhibit said certificate to the clerk of such other county and be registered, which registration shall be made by said clerk without fee or

Any person who practices or attempts to practice medicine or surgery in this State without first having registered and obtained the certificate required in this section, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned at the discretion of the court, for each and every offense: Provided, this section shall not apply to women pursuing the vocation of midwife, nor to reputable physicians or surgeons resident in a neighboring state coming into this State for consultation with a registered physician of this State. (1889, c. 181, ss. 4, 5; 1891, c. 420; Rev., ss. 3646, 4504; C. S., s. 6623; Ex. Sess. 1921, c. 44, s. 9.)

Editor's Note.-The 1921 amendment deleted a provision allowing registration upon presentment of a medical diploma issued prior to March 7, 1885 or making oath that applicant was practicing in this State prior to the last mentioned date.

What Constitutes Practicing.—To constitute the offense of practicing medicine without registration, etc., it is not necessary to allege or prove the person practiced upon; it is sufficient if the defendant held himself out to the public as a physician. State v. Van Doran, 109 N. C. 894, 14 S. E. 32 (1891).

Practice of Medicine by Licensed Osteopath. - A licensed osteopathic physician exceeds the limits of his certificate and is guilty of practicing medicine without being registered within the purview of this section, if he administers or prescribes drugs in treating the ailments of his patients. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948). See notes to §§ 90-18, 90-129.

- § 90-20. Clerk punishable for illegally registering physician.—If any clerk of the superior court shall register, or issue a certificate to, any person practicing medicine or surgery in any other manner than that prescribed by law, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred dollars and shall be removed from office. (1889, c. 181, s. 6; Rev., s. 3647; C. S., s. 6624.)
- § 90-21. Certain offenses prosecuted in superior court; duties of Attorney General.—In case of the violation of the criminal provisions of §§ 90-18 to 90-20, the Attorney General of the State of North Carolina, upon complaint of the Board of Medical Examiners of the State of North Carolina, shall

investigate the charges preferred, and if in his judgment the law has been violated, he shall direct the solicitor of the district in which the offense was committed to institute a criminal action against the offending persons. A solicitor's fee of five dollars shall be allowed and collected in accordance with the provisions of § 6-12. The Board of Medical Examiners may also employ, at their own expense, special counsel to assist the Attorney General or the solicitor.

Exclusive original jurisdiction of all criminal actions instituted for the violations of §§ 90-18 to 90-20 shall be in the superior court, the provisions of any special or local act to the contrary notwithstanding. (1915, c. 220, s. 2; C. S., s.

6625.)

ARTICLE 2.

Dentistry.

- § 90-22. Board of Dental Examiners continued; membership; term of office; vacancies; present members hold over. — The North Carolina State Board of Dental Examiners heretofore created by chapter one hundred and thirty-nine, Public Laws, one thousand eight hundred and seventy-nine and by chapter one hundred and seventy-eight, Public Laws one thousand nine hundred and fifteen, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State, said Board to consist of six (6) members of the North Carolina Dental Society, to be elected by the said Society at its annual meeting; said members so elected to be commissioned by the Governor for a period of three years or until their successors are elected, commissioned and qualified. Any vacancy in the said Board shall be filled by a member of the North Carolina Dental Society to be elected by said Board by and with the consent and approval of the executive committee of the North Carolina Dental Society, and commissioned by the Governor to hold office for the unexpired term to which elected. Nothing in this article and no provision of this section shall in any way change the terms of office of the members of the North Carolina State Board of Dental Examiners as now constituted, and said members of said Board shall hold their office for the term to which they have been elected. (1935, c. 66, s. 1.)
- § 90-23. Officers; common seal.—The North Carolina State Board of Dental Examiners shall, at each annual meeting thereof, elect one of its members president and one secretary-treasurer. The common seal which has already been adopted by said Board, pursuant to law, shall be continued as the seal of said Board. (1935, c. 66, s. 2.)
- § 90-24. Quorum; adjourned meetings. Four (4) members of said Board shall constitute a quorum for the transaction of business and at any meeting of the Board, if four (4) members are not present at the time and the place appointed for the meeting, those members of the Board present may adjourn from day to day until a quorum is present, and the action of the Board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1935, c. 66, s. 2.)
- § 90-25. Records and transcripts.—The said Board shall keep a record of its transactions at all annual or special meetings and shall provide a record book in which shall be entered the names and proficiency of all persons to whom licenses may be granted under the provisions of law. The said book shall show, also, the license number and the date upon which such license was issued and shall show such other matters as in the opinion of the Board may be necessary or proper. Said book shall be deemed a book of record of said Board and a transcript of any entry therein or a certification that there is not entered therein the name, proficiency and license number or date of granting such license, certified under the hand of the secretary-treasurer, attested by the seal of the North Carolina State

Board of Dental Examiners, shall be admitted as evidence in any court of this State when the same shall otherwise be competent. (1935, c. 66, s. 2.)

- § 90-26. Annual and special meetings.—The North Carolina State Board of Dental Examiners shall meet annually on the fourth Monday in June of each year at such place as may be determined by the Board, and at such other times and places as may be determined by action of the Board or by any four (4) members thereof. Notice of the place of the annual meeting and of the time and place of any special or called meeting shall be given by advertising a copy of said notice in at least three daily newspapers published in this State at least ten days prior to said meeting. At the annual meeting or at any special or called meeting, the said Board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1935, c. 66, s. 3.)
- § 90-27. Judicial powers; additional data for records. The president of the North Carolina State Board of Dental Examiners, and/or the secretary-treasurer of said Board, shall have the power to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it. The sheriff or other proper official of any county of the State shall serve the process issued by said president or secretary-treasurer of said Board pursuant to its requirements and in the same manner as process issued by any court of record. The said Board shall pay for the service of all process, such fees as are provided by law for the service of like process in other cases.

Any person who shall neglect or refuse to obey any subpoena requiring him to attend and testify before said Board or to produce books, records or documents shall be guilty of a misdemeanor and upon conviction thereof shall be fined or im-

prisoned in the discretion of the court.

The Board shall have the power, upon the production of any papers, records or data, to authorize certified copies thereof to be substituted in the permanent record of the matter in which such books, records or data shall have been introduced in evidence. (1935, c. 66, s. 4.)

- § 90-28. Bylaws and regulations.—The North Carolina State Board of Dental Examiners shall have the power to make necessary bylaws and regulations, not inconsistent with the provisions of this article, regarding any matter referred to in this article and for the purpose of facilitating the transaction of business by the said Board. (1935, c. 66, s. 5.)
- § 90-29. Necessity for license; dentistry defined; certain practices exempted. No person shall engage in the practice of dentistry in this State or attempt to do so without first having applied for and obtained a license for such purpose from the said North Carolina State Board of Dental Examiners, or without first having obtained from said Board a certificate of renewal of license for the calendar year in which such person proposes to practice dentistry.

A person shall be deemed to practice dentistry in this State within the meaning of this article and this section of this article, who represents himself as being able to remove stains and accretions from teeth, diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the human teeth, alveolar process, gums or maxillary bones and associated tissues or parts and/or who offers or undertakes by any means or methods to remove stains or accretions from teeth, diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the same, or to take impressions of the teeth or jaws and/or who owns, maintains or operates an office for the practice of dentistry, and/or who engages in any of the practices included in the curricular of recognized and approved dental schools or colleges.

The fact that a person uses any dental degree or designation or any card, device, directory, poster, sign or other media, whereby he represents himself to be a dentist practicing in the State, shall constitute prima facie evidence that such person is engaged in the practice of dentistry.

The following practices, acts, and operations, however, shall be exempt from the provisions of this article:

(a) Any act in the practice of his profession by a duly licensed physician or

(b) The rendering of dental relief in emergency cases in the practice of his profession by a physician or surgeon licensed as such and registered under the laws of this State, unless he undertakes to reproduce or reproduces lost parts of the human teeth in the mouth, or to restore or replace in the human mouth, lost or missing teeth.

(c) The practice of dentistry in the discharge of their official duties by dentists in the United States army, the United States navy, the United States public health

service, the United States veterans bureau, or other federal agency

(d) The teaching of dentistry in dental schools or colleges as may be conducted in the State of North Carolina and approved by the said North Carolina State Board of Dental Examiners, and the practice of dentistry by students in dental schools or colleges so approved when such students are acting under the direction and supervision of registered and licensed dentists acting as instructors.

(e) The practice of dentistry by licensed dentists of another state, territory or country at meetings of the North Carolina Dental Society, or component parts thereof, meetings of dental colleges or other like dental organizations while appearing as clinicians, or when appearing in emergency cases upon the specific call

of dentist duly licensed under the provisions of this article.

(f) The making, either upon written orders, prescriptions, casts, models or impressions furnished by a duly licensed dentist of artificial restorations, substitutes, appliances or materials for the correction of disease, loss, deformity, malposition, discoloration, fracture, injury to the jaws, teeth, lips, gums, cheeks, palate or associated tissues or parts. (1935, c. 66, s. 6.)

Legislature May Regulate Practice.— State v. Hicks, 143 N. C. 689, 57 S. E. The legislature has constitutional author-441 (1907). ity to regulate the practice of dentistry.

§ 90-30. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses. - The North Carolina State Board of Dental Examiners shall grant licenses to practice dentistry to such applicants who are graduates of a reputable dental institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of dentistry, subject, however, to the

further provisions of this section and of the provisions of this article.

The applicant shall be of good moral character, at least twenty-one years of age at the time the application for examination is filed. The application shall be made to the said Board in writing and shall be accompanied by evidence satisfactory to said Board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the said Board; that he is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the said Board.

The North Carolina State Board of Dental Examiners is authorized to conduct both written or oral and clinical examinations of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant license to any person who, in its discretion, is found deficient in said examination, or to any person guilty of cheating, deception or fraud during such examination, or whose examination discloses to the satisfaction of the Board, a deficiency in

academic education.

The North Carolina State Board of Dental Examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an extent as, in the opinion of the Board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be

void ab initio and of no effect. (1935, c. 66, s. 7.)

Mandamus to Procure License.—Under former § 6631 of the Consolidated Statutes it was held that the courts cannot by a mandamus compel the Board of Dental Examiners to certify contrary to what they have declared to be true. If the Board refused to examine an applicant, upon his compliance with the regulations, the court could by mandamus compel them

to examine him, but not to issue him a certificate, when the preliminary qualification required by law, that the applicant shall be found proficient and competent by the examining board, is lacking. Burton v. Furman, 115 N. C. 166, 20 S. E. 443 (1894); Loughran v. Hickory, 129 N. C. 281, 40 S. E. 46 (1901); Ewbank v. Turner, 134 N. C. 77, 46 S. E. 508 (1903).

§ 90-31. Annual renewal of licenses.—The laws of North Carolina now in force, having provided for the annual renewal of any license issued by the North Carolina State Board of Dental Examiners, it is hereby declared to be the policy of this State, that all licenses heretofore issued by the North Carolina State Board of Dental Examiners or hereafter issued by said Board are subject to annual renewal and the exercise of any privilege granted by any license heretofore issued or hereafter issued by the North Carolina State Board of Dental Examiners is subject to the issuance on or before the first day of January of each year of a certificate of renewal of license.

On or before the first day of January of each year, each dentist engaged in the practice of dentistry in North Carolina shall make application to the North Carolina State Board of Dental Examiners and receive from said Board, subject to the further provisions of this section and of this article, a certificate of

renewal of said license.

The application shall show the serial number of the applicant's license, his full name, address and the county in which he has practiced during the preceding year, the date of the original issuance of license to said applicant and such other information as the said Board from time to time may prescribe, at least six months prior to January first of any year. (1935, c. 66, s. 8.)

- § 90-32. Contents of original license.—The original license granted by the North Carolina State Board of Dental Examiners shall bear a serial number, the full name of the applicant, the date of issuance and shall be signed by the president and the majority of the members of the said Board and attested by the seal of said Board and the secretary thereof. The certificate of renewal of license shall bear a serial number which need not be the serial number of the original license issued, the full name of the applicant and the date of issuance. (1935, c. 66, s. 8.)
- § 90-33. Displaying license and current certificate of renewal.—The license and the current certificate of renewal of license to practice dentistry issued, as herein provided, shall at all times be displayed in a conspicuous place in the office of the holder thereof and whenever requested the license and the current certificate of renewal shall be exhibited to or produced before the North Carolina State Board of Dental Examiners or to its authorized agents. (1935, c. 66, s. 8.)
- § 90-34. Refusal to grant renewal license.—For cause satisfactory to it or to a majority thereof, the North Carolina State Board of Dental Examiners may refuse to issue a certificate of renewal of license upon any application made to it therefor, and the applicant whose certificate of renewal of license is refused, for cause by said Board, shall not be authorized to practice dentistry

in North Carolina until said Board shall, in its discretion, renew the license of the applicant. (1935, c. 66, s. 8.)

- § 90-35. Duplicate licenses.—When a person is a holder of a license to practice dentistry in North Carolina or the holder of a certificate of renewal of license, he may make application to the North Carolina State Board of Dental Examiners for the issuance of a copy or a duplicate thereof accompanied by a fee of two dollars. Upon the filing of the application and the payment of the fee, the said Board shall issue a copy or duplicate. (1935, c. 66, s. 8.)
- § 90-36. Licensing practitioners of other states. The North Carolina State Board of Dental Examiners may, in its discretion, issue a license to practice dentistry in this State without an examination other than clinical to a legal and ethical practitioner of dentistry who moves into North Carolina from another state or territory of the United States, whose standard of requirements is equal to that of the State of North Carolina and in which such applicant has conducted a legal and ethical practice of dentistry for at least five (5) years, next preceding his or her removal and who has not, during his period of practice, been charged with violation of the ethics of his profession, nor with the violation of the laws of the state which issued license to him, or of the criminal laws of the United States, nor whose license to practice dentistry has been revoked or suspended by a duly constituted authority.

Application for license to be issued under the provisions of this section shall be accompanied by a certificate from the dental board or like board of the state from which said applicant removed, certifying that the applicant is the legal holder of a license to practice dentistry in that state, and for a period of five (5) years immediately preceding the application has engaged in the practice of dentistry; is of good moral character and that during the period of his practice no charges have been filed with said board against the applicant for the violation of the laws of the state or of the United States, or for the violation of the ethics

of the profession of dentistry.

Application for a license under this section shall be made to the North Carolina State Board of Dental Examiners within the six (6) months of the date of the issuance of the certificate hereinbefore required, and said certificate shall be accompanied by the diploma or other evidence of the graduation from a reputable, recognized and approved dental college, school or dental department of a college

or university.

Any license issued upon the application of any dentist from any other state or territory shall be subject to all of the provisions of this article with reference to the license issued by the North Carolina State Board of Dental Examiners upon examination of applicants and the rights and privileges to practice the profession of dentistry under any license so issued shall be subject to the same duties, obligations, restrictions and the conditions as imposed by this article on dentists originally examined by the North Carolina State Board of Dental Examiners. (1935, c. 66, s. 9.)

- § 90-37. Certificate issued to dentist moving out of State.—Any dentist duly licensed by the North Carolina State Board of Dental Examiners, desiring to move from North Carolina to another state, territory or foreign country, if a holder of a certificate of renewal of license from said Board, upon application to said Board and the payment to it of the fee in this article provided, shall be issued a certificate showing his full name and address, the date of license originally issued to him, the date and number of his renewal of license, and whether any charges have been filed with the Board against him. The Board may provide forms for such certificate, requiring such additional information as it may determine proper. (1935, c. 66, s. 10.)
 - § 90-38. Licensing former dentists who have moved back into State

or resumed practice.—Any person who shall have been licensed by the North Carolina State Board of Dental Examiners to practice dentistry in this State who shall have retired from practice or who shall have moved from the State and shall have returned to the State, may, upon a satisfactory showing to said Board of his proficiency in the profession of dentistry and his good moral character during the period of his retirement, be granted by said Board a license to resume the practice of dentistry upon making application to the said Board in such form as it may require and upon the payment of the fee of ten dollars. The license to resume practice, after issuance thereof, shall be subject to all the provisions of this article. (1935, c. 66, s. 11.)

This section is constitutional and valid as an exercise of the police power of the State for the good and welfare of the people. Allen v. Carr, 210 N. C. 513, 187 S. E. 809 (1936).

And its provisions bear alike upon all classes of persons referred to. Hence the requirement made by the Board that the plaintiff make to it a satisfactory showing of his proficiency in the profession of dentistry is no discrimination against the plaintiff. Allen v. Carr, 210 N. C. 513, 187 S. E. 809 (1936).

Mandamus will not lie to control the decision of the Board in the exercise of its discretionary power under this section, the extent of mandamus in such cases being limited to compel the exercise of the dis-

cretionary power, but not to control the decision reached in its exercise. Allen v. Carr, 210 N. C. 513, 187 S. E. 809 (1936).

Licensed Dentist Removing from State Must Take Second Examination upon Return.—A dentist licensed by the State Board of Dental Examiners, who thereafter moves from this State and practices his profession successively in other states, upon examination and license by them, and then returns to this State, must obtain a license to resume practice here by passing a second examination by the State Board of Dental Examiners, although such dentist has continuously practiced dentistry since he was first licensed by the State Board. Allen v. Carr, 210 N. C. 513, 187 S. E. 809 (1936).

§ 90-39. Fees collectible by Board.—In order to provide the means of carrying out and enforcing the provisions of this article and the duties devolving upon the North Carolina State Board of Dental Examiners, it shall charge and collect for: (a) each applicant for examination, a fee of twenty dollars; (b) each certificate of renewal of license, a fee of two dollars; (c) each certificate of practice to a resident dentist desiring to change to another state or territory, a fee of five dollars; (d) each license issued to a legal practitioner of another state or territory to practice in this State, a fee of twenty dollars; (e) each license to resume the practice issued to a dentist who has retired from the practice of dentistry, or has removed from and returned to the State, a fee of ten dollars. (1935, c. 66, s. 12.)

§ 90-40. Unauthorized practice; penalty.—If any person shall practice or attempt to practice dentistry in this State without first having passed the examination and obtained a license from the North Carolina Board of Dental Examiners; or, if a period of more than one year has elapsed since the issuance of his license, and he shall practice without first having obtained a certificate of renewal of license; or shall practice or attempt to practice dentistry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall violate any of the provisions of this article for which no specific penalty has been provided, or shall practice dentistry under any name other than his own name, said person shall be guilty of a misdemeanor, and, upon conviction, shall be fined in the sum of fifty (\$50.00) dollars for the first offense.

Whenever any person shall have been convicted once in this State of the violation of chapter one hundred and thirty-nine, Public Laws of one thousand eight hundred and seventy-nine, and/or chapter one hundred and seventy-eight, Public Laws of one thousand nine hundred and fifteen and/or amendments to said acts and/or of this article, and shall practice, or attempt to practice, dentistry in violation of the provisions of this article, he shall be guilty of a misdemeanor

and, upon conviction, shall be fined or imprisoned in the discretion of the court. (1935, c. 66, s. 13.)

Conviction Held Proper.—The legislature has constitutional authority to regulate the practice of dentistry, and a conviction of the convic

§ 90-41. Revocation or suspension of license.—Whenever it shall appear to the North Carolina State Board of Dental Examiners that any dentist who has received license to practice dentistry in this State, or who has received from the said Board of Dental Examiners a certificate of renewal of license, has been guilty of fraud, deceit or misrepresentation in obtaining his license, or of gross immorality, or is an habitual user of intoxicants or drugs, rendering him unfit for the practice of dentistry, or has been guilty of malpractice, or is grossly ignorant or incompetent or has been guilty of willful neglect in the practice of dentistry, or has been employing unlicensed persons to perform work which, under this article, can be legally done or performed only by persons holding a license to practice dentistry in this State, or of practicing deceit or other fraud upon the public or individual patients in obtaining or attempting to obtain practice, or has been guilty of fraudulent and/or misleading statements of his art skill or knowledge, or of his method of treatment or practice, or any offense involving moral turpitude, or has by himself or another, solicited or advertised in any manner for professional business, or has been guilty of any other unprofessional conduct in the practice of dentistry, or in the procurement of license has filed, as his own, a diploma or license of another, or a forged diploma or a forged or false affidavit of identification or qualification, the Board may revoke the license of such person, or may suspend the license of such person for such period of time as, in the judgment of said Board, will be commensurate with the offense committed: Provided, however, it shall not be considered advertising within the meaning of this article for a dentist, duly authorized to practice in this State, to place a card containing his name, telephone number and office address and office hours in a registry or other publication, or to place upon the window or door of his office his name followed by the word, "dentist."

The North Carolina State Board of Dental Examiners is authorized and empowered to appoint an investigator to ascertain the facts with reference to any information coming to the attention of the said Board respecting the violation of any of the provisions of this article, or of any act heretofore in effect in this State.

Such investigator so appointed by the North Carolina State Board of Dental Examiners is thereupon authorized and directed to make an investigation as to any information coming to his attention with reference to the violation of the provisions of this article or any act in force at the time of said violation, and formulate a statement of charges which the said Board, upon presentation by the said investigator, shall cause to be served upon the dentist so accused. Said notice shall contain the statement of a time and place at which the charges against the accused shall be heard before the Board or a quorum thereof, which time shall not be less than ten (10) days from the date of service of said statement and notice.

At the time and place named in said notice, the said Board shall proceed to hear the charges against the accused upon competent evidence, oral or by deposition, and at said hearing said accused shall have the right to be present in person and/or represented by counsel. After hearing all the evidence, including such evidence as the accused may present, the Board shall determine its action and announce the same.

From any action of the Board depriving the accused of his license, or certificate of renewal of license, the accused shall have the right of appeal to the superior court of the county wherein the hearing was held, upon filing notice of appeal

within ten days of the decision of the Board. The record of the hearing before the North Carolina State Board of Dental Examiners shall constitute the record upon appeal in the superior court and the same shall be heard in the superior court as in the case of consent references. (1935, c. 66, s. 14.)

As to advertising under former law, see In re Owen, 207 N. C. 445, 177 S. E. 403 (1934).

- § 90-42. Restoration of revoked license. Whenever any dentist has been deprived of his license, the North Carolina State Board of Dental Examiners, in its discretion, may restore said license upon due notice being given and hearing had, and satisfactory evidence produced of proper reformation of the licentiate, before restoration. (1935, c. 66, s. 14.)
- § 90-43. Compensation and expenses of Board.—Each member of the North Carolina State Board of Dental Examiners shall receive as compensation for his services in the performance of his duties under this article a sum not exceeding ten dollars for each day actually engaged in the performance of the duties of his office, said per diem to be fixed by said Board, and all legitimate and necessary expenses incurred in attending meetings of the said Board.

The secretary-treasurer shall, as compensation for his services, both as secretary-treasurer of the Board and a member thereof, be allowed a reasonable annual salary to be fixed by the Board and shall, in addition thereto, receive all legitimate and necessary expenses incurred by him in attending meetings of the Board and

in the discharge of the duties of his office.

All per diem allowances and all expenses paid as herein provided shall be paid upon voucher drawn by the secretary-treasurer of the Board who shall likewise draw voucher payable to himself for the salary fixed for him by the Board.

The Board is authorized and empowered to expend from funds collected hereunder such additional sum or sums as it may determine necessary in the administration and enforcement of this article. (1935, c. 66, s. 15.)

- § 90-44. Annual report of Board.—Said Board shall, on or before the fifteenth day of February in each year, make an annual report as of the thirty-first day of December of the year preceding, of its proceedings, showing therein the examinations given, the fees received, the expenses incurred, the hearings conducted and the result thereof, which said report shall be filed with the Governor of the State of North Carolina. (1935, c. 66, s. 15.)
- § 90-45. Exemption from jury duty.—All dentists duly licensed by the North Carolina State Board of Dental Examiners and/or the holders of certificate of renewal of license from said Board shall be exempt from service as jurors in any of the courts of this State. (1935, c. 66, s. 16.)
- § 90-46. Filling prescriptions.—Legally licensed druggists of this State may fill prescriptions of dentists duly licensed by the North Carolina State Board of Dental Examiners. (1935, c. 66, s. 17.)
- § 90-47. Restrictions on lectures and teaching.—Lectures on the science of dentistry shall not be made in North Carolina in connection with the demonstration, promotion or distribution of any product or products used or claimed to be useful in the promotion of the health of the oral cavity, except after specific authority has been granted by the North Carolina State Board of Dental Examiners, nor shall the science of dentistry be taught in North Carolina except by duly licensed dentists acting as teachers in a duly organized school or college of dentistry or a dental department of a college or university. (1935, c 66, s. 18.)

§ 90-48. Rules and regulations of Board; violation a misdemeanor.—The North Carolina State Board of Dental Examiners shall be and is hereby vested, as an agency of the State, with full power and authority to enact rules and regulations governing the practice of dentistry within the State, provided such rules and regulations are not inconsistent with the provisions of this article. Such rules and regulations shall become effective thirty days after passage, and the same may be proven, as evidence, by the president and/or the secretary-treasurer of the Board, and/or by certified copy under the hand and official seal of the secretary-treasurer. A certified copy of any rule or regulation shall be receivable in all courts as prima facie evidence thereof if otherwise competent, and any person, firm, or corporation violating any such rule, regulation, or bylaw shall be guilty of a misdemeanor, subject to a fine of not more than fifty (\$50.00) dollars or imprisonment for not more than thirty days. (1935, c. 66, s. 19.)

ARTICLE 3.

The Licensing of Mouth Hygienists to Teach and Practice Mouth Hygiene in Public Institutions.

§§ 90-49 to 90-52: Repealed by Session Laws 1945, c. 639, s. 14. Cross Reference.—As to dental hygiene, see §§ 90-221 to 90-233.

ARTICLE 4.

Pharmacy.

Part 1. Practice of Pharmacy.

- § 90-53. North Carolina Pharmaceutical Association. The North Carolina Pharmaceutical Association, and the persons composing the same, shall continue to be a body politic and corporate under the name and style of the North Carolina Pharmaceutical Association, and by said name have the right to sue and be sued, to plead and be impleaded, to purchase and hold real estate and grant the same, to have and to use a common seal, and to do such other things and perform such other acts as appertain to bodies corporate and politic not inconsistent with the Constitution and laws of the State. (1881, c. 355, s. 1; Code, s. 3135; Rev., s. 4471; C. S., s. 6650.)
- § 90-54. Object of Pharmaceutical Association.—The object of the Association is to unite the pharmacists and druggists of this State for mutual aid, encouragement, and improvement; to encourage scientific research, develop pharmaceutical talent, to elevate the standard of professional thought, and ultimately restrict the practice of pharmacy to properly qualified druggists and apothecaries. (1881, c. 355, s. 2; Code, s. 3136; Rev., s. 4472; C. S., s. 6651.)
- § 90-55. Board of Pharmacy; election; terms; vacancies. The Board of Pharmacy shall consist of five persons licensed as pharmacists within this State, who shall be elected and commissioned by the Governor as hereinafter provided. The members of the present Board of Pharmacy shall continue in office until the expiration of their respective terms, and the rules, regulations, and bylaws of said Board, so far as they are not inconsistent with the provisions of this article, shall continue in effect. The North Carolina Pharmaceutical Association shall annually elect a resident pharmacist from its number to fill the vacancy annually occurring in said Board, and the pharmacist so elected shall be commissioned by the Governor and shall hold office for the term of five years and until his successor has been duly elected and qualified. In case of death, resignation, or removal from the State of any member of said Board of Pharmacy, the said Board shall elect in his place a pharmacist who is a member of said North

Carolina Pharmaceutical Association, who shall be commissioned by the Governor as a member of the said Board of Pharmacy for the remainder of the term. It shall be the duty of a member of the Board of Pharmacy, within ten days after receipt of notification of his appointment and commission, to appear before the clerk of the superior court of the county in which he resides and take and subscribe an oath to properly and faithfully discharge the duties of his office according to law. (1905, c. 108, ss. 5-7; Rev., s. 4473; C. S., s. 6652.)

- § 90-56. Election of officers; bonds; annual meetings.—The Board of Pharmacy shall elect two officers, a president and a secretary-treasurer, who shall hold their offices until their successors shall have been elected and qualified. The president shall be elected from the membership of the Board. The secretary-treasurer may or may not be a member of the Board, as the Board shall determine. The secretary-treasurer shall give bond in such sum as may be prescribed by the Board, conditioned for the faithful discharge of the duties of his office according to law, and said bond shall be made payable to the North Carolina Board of Pharmacy and approved by said Board. The said Board shall hold an annual meeting at such time and place as it may provide by rule for the examination of candidates and for the discharge of such other business as may legally come before it, and said Board may hold such additional meetings as may be necessary for the examination of candidates and for the discharge of any other business. (1905, c. 108, s. 8; Rev., s. 4474; C. S., s. 6653; 1923, c. 82.)
- § 90-57. Powers of Board; reports; quorum; records.—The Board of Pharmacy shall have a common seal, and shall have the power and authority to define and designate nonpoisonous domestic remedies, to adopt such rules, regulations, and bylaws, not inconsistent with this article, as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under this article, and shall have power and authority to employ inspectors, chemists, and an attorney to conduct prosecutions and to assist in the conduct of prosecutions under this article, and for any other purposes which said Board may deem necessary. The said Board of Pharmacy shall keep a record of its proceedings and a register of all persons to whom certificates of license as pharmacists and permits have been issued, and of all renewals thereof; and the books and register of the said Board, or a copy of any part thereof, certified by the secretary, attested by the seal of said Board, shall be taken and accepted as competent evidence in all the courts of the State. The said Board of Pharmacy shall make annually to the Governor and to the North Carolina Pharmaceutical Association written reports of its proceedings and of its receipts and disbursements under this article, and of all persons licensed to practice as pharmacists in this State. A majority of the Board shall constitute a quorum for the transaction of all business. (1905, c. 108, s. 9; Rev., s. 4475; 1907, c. 113, s. 1; C. S., s. 6654; 1945, c.

Editor's Note.—The 1945 amendment authorized the employment of inspectors and chemists.

§ 90-58. Compensation of secretary and Board.—The secretary of the Board of Pharmacy shall receive such salary as may be prescribed by the Board, and shall be paid his necessary expenses while engaged in the performance of his official duties. The other members of the said Board shall receive the sum of ten dollars for each day actually employed in the discharge of their official duty and their necessary expenses while engaged therein: Provided, that the compensation and expenses of the secretary and members of the said Board of Pharmacy and all disbursements for expenses incurred by the said Board in carrying into effect and executing the provisions of this article shall be paid out of the fees received by the said Board. (1905, c. 108, s. 10; Rev., s. 4476; C. S., s. 6655; 1921, c. 57, s. 2.)

§ 90-59. Secretary to investigate and prosecute.—Upon information that any provision of this article has been or is being violated by any member, the secretary of the Board of Pharmacy or anyone appointed by the said Board of Pharmacy shall promptly make investigations of such matters, and, upon probable cause appearing, shall file complaint and prosecute the offender. All fines and penalties prescribed in this article shall be recoverable by suit in the name of the people of the State. In all prosecutions for the violation of any of the provisions of this article, a certificate under oath by the secretary of the Board of Pharmacy shall be competent and admissible as evidence in any court of the State that the person so charged with the violation of this article is not a registered pharmacist or assistant pharmacist, as required by law. (1905, c. 108, s. 11; Rev., s. 4477; C. S., s. 6656; 1923, c. 74, s. 1.)

Editor's Note.—Prior to the 1923 amendment investigation and prosecution was restricted to the secretary of the Board

and there was no provision for admission as evidence of a certificate of the secretary under oath. See 1 N. C. Law Rev. 300.

§ 90-60. Fees collectible by Board.—The Board of Pharmacy shall be entitled to charge and collect the following fees: For the examination of an applicant for license as a pharmacist, ten dollars; for renewing the license as a pharmacist or an assistant pharmacist, five dollars; for licenses without examination as provided in § 90-64, original, twenty-five dollars, and renewal thereof, five dollars; for original registration of a drugstore, twenty-five dollars, and renewal thereof, ten dollars; for issuing a permit to a physician to conduct a drugstore in a village of not more than five hundred inhabitants, ten dollars; for the renewal of permit to a physician to conduct a drugstore in a village of not more than five hundred inhabitants, five dollars. All fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists or before any license or permit, or any renewal thereof, may be issued by the Board. (1905, c. 108, s. 12; Rev., s. 4478; C. S., s. 6657; 1921, c. 57, s. 3; 1945, c. 572, s. 3.)

Editor's Note.—The 1945 amendment inserted the provision as to fees for licenses without examination.

§ 90-61. Application and examination for license, prerequisites. — Every person licensed or registered as a pharmacist on February 4, 1905, under the laws of this State shall be entitled to continue in the practice of his profession until the expiration of the term for which his certificate of registration or license was issued. Every person who shall desire to be licensed as a pharmacist shall file with the secretary of the Board of Pharmacy an application, duly verified under oath, setting forth the name and age of the applicant, the place or places at which and the time he has spent in the study of the science and art of pharmacy, the experience in the compounding of physicians' prescriptions which the applicant has had under the direction of a legally licensed pharmacist, and such applicant shall appear at a time and place designated by the Board of Pharmacy and submit to an examination as to his qualifications for registration as a licensed pharmacist. The application referred to above shall be prepared and furnished by the Board of Pharmacy.

In order to become licensed as a pharmacist, within the meaning of this article, an applicant shall be not less than twenty-one years of age, he shall present to the Board of Pharmacy satisfactory evidence that he has had four years experience in pharmacy under the instruction of a licensed pharmacist, and that he is a graduate of a reputable school or college of pharmacy, and he shall also pass a satisfactory examination of the Board of Pharmacy: Provided, however, that the actual time of attendance at a reputable school or college of pharmacy, not to exceed three years, may be deducted from the time of experience required. Provided, further, that any person legally registered or licensed as

a pharmacist by another state board of pharmacy, and who has had fifteen years continuous experience in North Carolina under the instruction of a licensed pharmacist next preceding his application shall be permitted to stand the examination to practice pharmacy in North Carolina upon application filed with said Board. Any person who has had two years of college training and has been filling prescriptions in a drugstore or stores for twenty years or longer may take the examination as provided in the above proviso. (1905, c. 108, s. 13; Rev.. ss. 4479, 4480; 1915, c. 165; C. S., s. 6658; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181; 1937, c. 94.)

Editor's Note.—The 1933 amendment inserted the second proviso in the second paragraph relative to pharmacists in another state taking the examination in North Carolina, and the 1937 amendment abolished the time restriction formerly appearing in the proviso. The 1935 amend-

ment increased the maximum deductible time in the first proviso of the second paragraph from two to three years.

For decision under the 1933 amendment, see McNair v. North Carolina Board of Pharmacy, 208 N. C. 279, 180 S. E. 78 (1935).

- § 90-62. When license issued.—If an applicant for license as pharmacist has complied with all the requirements of §§ 90-60 and 90-61, the Board of Pharmacy shall enroll his name upon the register of pharmacists and issue to him a license, which shall entitle him to practice as a pharmacist up to the first day of January next ensuing, as provided in this article for the annual renewal of every registration. (1905, c. 108, s. 15; Rev., s. 4481; C. S., s. 6659; 1921, c. 68, s. 1.)
- § 90-63. Certain assistant pharmacists may take registered pharmacist's examination; no original assistants' certificates issued after January 1, 1939.—Every person who is the holder of a certificate as a registered assistant pharmacist, issued prior to January first, one thousand nine hundred and thirty-nine, shall be admitted to the registered pharmacist examination. After January first, one thousand nine hundred and thirty-nine, the Board shall not issue an original certificate to any person as a registered assistant pharmacist: Provided, however, that nothing in this section shall prevent any person who was registered as an assistant pharmacist prior to January first, one thousand nine hundred and thirty-nine, from continuing to practice as a registered assistant pharmacist. (1937, c. 402.)
- § 90-64. When license without examination issued. The Board of Pharmacy may issue licenses to practice as pharmacists in this State, without examination, to such persons as have been legally registered or licensed as pharmacists by other boards of pharmacy, if the applicant for such license shall present satisfactory evidence of the same qualifications as are required from licentiates in this State, and that he was registered or licensed by examination by such other board of pharmacy, and that the standard of competence required by such board of pharmacy is not lower than that required in this State. All applicants for license under this section shall, with their application, forward to the secretary of the Board of Pharmacy a fee of twenty-five dollars (\$25.00). (1905, c. 108, s. 16; Rev., s. 4482; C. S., s. 6660; 1945, c. 572, s. 2.)

Editor's Note.—The 1945 amendment for the words "the same fees as are resubstituted the words "a fee of twenty-five dollars (\$25.00)" at the end of the section

§ 90-65. When license refused or revoked; fraud.—The Board of Pharmacy may refuse to grant a license to any person guilty of felony or gross immorality, or who is addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him unfit to practice pharmacy; and the Board of Pharmacy may, after due notice and hearing, revoke a license for like cause, or any license which has been procured by fraud. Any license or permit, or renewal thereof, obtained through fraud or by any fraudulent or false representations

shall be void and of no effect in law. (1905, c. 108, ss. 17, 25; Rev., s. 4483; C. S., s. 6661.)

§ 90-66. Expiration and renewal of license; failure to renew misdemeanor.—Every licensed pharmacist or assistant pharmacist who desires to continue in the practice of his profession, and every physician holding a permit to sell drugs in a village of not more than six hundred inhabitants, shall within thirty days next preceding the expiration of his license or permit, file with the secretary and treasurer of the Board of Pharmacy an application for the renewal thereof, which application shall be accompanied by the fee hereinbefore prescribed. If the Board of Pharmacy shall find that an applicant has been legally licensed in this State, and is entitled to a renewal thereof, or to a renewal of a permit, it shall issue to him a certificate attesting that fact. And if any pharmacist or assistant pharmacist shall fail, for a period of sixty days after the expiration of his license, to make application to the Board for its renewal, his name shall be erased from the register of licensed pharmacists and assistant pharmacists and such person, in order to again become registered as a licensed pharmacist or assistant pharmacist shall be required to pay the same fee as in the case of original registration. And if any holder of a permit to sell drugs in a village of not more than six hundred inhabitants shall fail, for a period of sixty days after the expiration of his permit, to make application for the renewal thereof, his name shall be erased from the register of persons holding such permits, and he may be restored thereto only upon the payment of the fee required for the granting of original permit. The registration of every license and every permit issued by the Board shall expire on the thirty-first day of December next ensuing the granting thereof: Provided that the Board of Pharmacy, in its discretion, shall have the power to issue a license or permit, or renewals thereof, to any person whose license or permit has been revoked by operation of law or by the Board of Pharmacy, or whose renewal thereof has been refused by the Board of Pharmacy, after the expiration of one year from the date of such revocation of license or permit, or refusal of a renewal thereof, upon satisfactory proof that such person is entitled to such license or permit, or to a renewal thereof.

Every holder of a license or permit as a pharmacist or assistant pharmacist, who after the expiration thereof continues to carry on the business for which the license or permit was granted, without renewing the same as required by this section, shall be guilty of a misdemeanor, and fined not less than five nor more than twenty-five dollars. (1905, c. 108, ss. 18, 19, 27; Rev., ss. 3653, 4484; 1911, c. 48; C. S., s. 6662; 1921, c. 68, s. 2; 1947, c. 781.)

Editor's Note.—The 1947 amendment substituted "sixty days" for "six days" near the beginning of the third sentence.

§ 90-67. License to be displayed; penalty.—Every certificate or license to practice as a pharmacist or assistant pharmacist and every permit to a practicing physician to conduct a pharmacy or drugstore in a village of not more than six hundred inhabitants, and every last renewal of such license or permit, shall be conspicuously exposed in the pharmacy or drugstore or place of business of which the pharmacist, or other person to whom it is issued, is the owner or manager, or in which he is employed.

The holder of such license, permit, or renewal who fails to expose it as required by this section shall be guilty of a misdemeanor, and fined not less than five nor more than twenty-five dollars, and each day that such license, permit, or renewal thereof shall not be exposed shall be held to constitute a separate and distinct offense. (1905, c. 108, ss. 18, 26; Rev., ss. 3651, 4485; C. S., s. 6663; 1921, c. 68, s. 3.)

§ 90-68. Unlicensed person not to use title of pharmacist; penalty.—It shall be unlawful for any person not legally licensed as a pharmacist or assistant pharmacist to take, use or exhibit the title of pharmacist or assistant pharmacist or licensed or registered pharmacist, or the title druggist or apothecary, or any other title, name, or description of like import.

Every person who violates this section shall be guilty of a misdemeanor and be fined not less than twenty-five nor more than one hundred dollars. (1905, c.

108, ss. 22, 29; Rev., ss. 3652, 4486; C. S., s. 6664; 1921, c. 68, s. 4.)

§ 90-69. Purity of drugs protected; seller responsible; adulteration misdemeanor.—Every person who shall engage in the sale of drugs, chemicals, and medicines shall be held responsible for the quality of all drugs, chemicals, and medicines he may sell or dispense, with the exception of those sold in the original packages of the manufacturers, and also those known as "patent or

proprietary medicines."

If any person engaged in the sale of drugs, chemicals, and medicines shall intentionally adulterate, or cause to be adulterated, or exposed to sale knowing the same to be adulterated, any drugs, chemicals, or medical preparations, he shall be guilty of a misdemeanor and liable to a fine not exceeding one hundred dollars, and if he is a licensed pharmacist or assistant pharmacist his name shall be stricken from the register of licensed pharmacists and assistant pharmacists. (1881, c. 355, s. 11; Code, s. 3145; 1897, c. 182, s. 7; 1905, c. 108, s. 3; Rev., ss. 3648, 4488; C. S., s. 6665; 1921, c. 68, s. 5.)

- § 90-70. Prescriptions preserved; copies furnished.—Every proprietor or manager of a drugstore or pharmacy shall keep in his place of business a suitable book or file, in which shall be preserved for a period of not less than five years the original of every prescription compounded or dispensed at such drugstore or pharmacy. Upon the request of the prescribing physician, or of the person for whom such prescription was compounded or dispensed, the proprietor or manager of such drugstore or pharmacy shall furnish a true and correct copy of such prescription, and said book or file of original prescriptions shall at all times be open to the inspection and examination of duly authorized officers of the law or other persons authorized and directed by the Board of Pharmacy to make such inspection and examination. (1905, c. 108, s. 21; Rev., s. 4490; C. S., s. 6666.)
- § 90-71. Selling drugs without license prohibited; drug trade regulated .- It shall be unlawful for any person not licensed as a pharmacist or assistant pharmacist within the meaning of this article to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding, or dispensing of any drugs, chemicals, or poison, or for the compounding of physicians' prescriptions, or to keep exposed for sale at retail any drugs, chemicals, or poison, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this article to compound, dispense, or sell at retail any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compound physicians' prescriptions except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist under this article. Provided, that during the temporary absence of the licensed pharmacist in charge of any pharmacy, drug or chemical store, a licensed assistant pharmacist may conduct or have charge of said store. And it shall be unlawful for any owner or manager of a pharmacy or drugstore or other place of business to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense, or sell at retail any drug, medicine, or poison, except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist.

Nothing in this section shall be construed to interfere with any legally regis-

tered practitioner of medicine in the compounding of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the selling at retail of nonpoisonous domestic remedies, nor with the sale of patent or proprietary preparations which do not contain poisonous ingredients, nor, except in cities and towns wherein there is located an established drugstore, and except in the counties of Avery, Bertie, Cabarrus, Cleveland, Cumberland, Duplin, Forsyth, Gaston, Guilford, Halifax, Harnett, Henderson, Iredeil, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Orange, Pender, Richmond, Robeson, Rockingham, Rowan, Scotland and Wilson, shall this section be construed to interfere with the sale of paregoric, Godfrey's Cordial, aspirin, alum, borax, bicarbonate of soda, calomel tablets, castor oil, compound cathartic pills, copperas, cough remedies which contain no poison or narcotic drugs, cream of tartar, distilled extract witch hazel, epsom salts, harlem oil, gum asafetida, gum camphor, glycerin, peroxide of hydrogen, petroleum jelly. saltpetre, spirit of turpentine, spirit of camphor, sweet oil, and sulphate of quinine, nor with the sale of poisonous substances which are sold exclusively for use in the arts or for use as insecticides when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word "Poison," the vignette of the skull and crossbones, and the name of at least two readily obtainable antidotes.

In any village of not more than six hundred inhabitants the Board of Pharmacy may, after due investigation, grant any legally registered practicing physician a permit to conduct a drugstore or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than six hundred. (1905, c. 108, s. 4; Rev., s. 4487; C. S., s. 6667; 1921, c. 68, s. 6; Ex. Sess. 1924, c. 116.)

Local Modification.—Johnston: 1929, c. 249; McDowell, Onslow: 1925, c. 27.
Editor's Note.—For comment on this

section and the 1924 amendment, see 3 N. C. Law Rev. 29.

§ 90-72. Compounding prescriptions without license.—If any person, not being licensed as a pharmacist or assistant pharmacist, shall compound, dispense, or sell at retail any drug, medicine, poison, or pharmaceutical preparation. either upon a physician's prescription or otherwise, and if any person being the owner or manager of a drugstore, pharmacy, or other place of business, shall cause or permit anyone not licensed as a pharmacist or assistant pharmacist to dispense, sell at retail, or compound any drug, medicine, poison, or physician's prescription contrary to the provisions of this article, he shall be deemed guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars. (1905, c. 108, s. 24; Rev., s. 3649; C. S., s. 6668; 1921, c. 68, s. 7.)

Editor's Note.—The 1921 amendment made this section applicable to assistant pharmacists.

Sale by Clerk.—Where a clerk in a drug store unlawfully sells intoxicating liquor without the knowledge and against the orders of the owner, the owner is not liable for the act of the clerk. State v. Neal, 133 N. C. 689, 45 S. E. 756 (1903), distinguishing State v. Kittelle, 110 N. C. 560, 15 S. E. 103 (1892).

Stated in McNair v. North Carolina Board of Pharmacy, 208 N. C. 279, 180 S. E. 78 (1935).

§ 90-73. Conducting pharmacy without license.—If any person, not being licensed as a pharmacist, shall conduct or manage any drugstore, pharmacy, or other place of business for the compounding, dispensing, or sale at retail of any drugs, medicines, or poisons, or for the compounding of physicians' prescriptions contrary to the provisions of this article, he shall be deemed guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars, and each week such drugstore or pharmacy or other place of business is so

unlawfully conducted shall be held to constitute a separate and distinct offense. (1905, c. 108, s. 23; Rev., s. 3650; C. S., s. 6669.)

- § 90-74. Pharmacist obtaining license fraudulently. If any person shall make any fraudulent or false representations for the purpose of procuring a license or permit, or renewal thereof, either for himself or for another, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars; and if any person shall willfully make a false affidavit or any other false or fraudulent representation for the purpose of procuring a license or permit, or renewal thereof, either for himself or for another, he shall be deemed guilty of perjury, and upon conviction thereof shall be subject to like punishment as is now prescribed for the crime of perjury. (1905, c. 108, s. 25; Rev., s. 3654; C. S., s. 6670.)
- § 90-75. Registration of drugstores and pharmacies.—The Board of Pharmacy shall require and provide for the annual registration of every drugstore and pharmacy doing business in this State; the proprietor of every drugstore or pharmacy opening for business after January 1, 1928, shall apply to the Board of Pharmacy for registration and it shall be unlawful for any drugstore or pharmacy to do business until so registered; the fee for such registration, whether original or annual, shall be one dollar (\$1), and upon the payment thereof the Board of Pharmacy shall issue permit to applicant entitled to receive same. All permits issued under this section shall expire on December thirty-first of each year.

The terms "drugstore" and "pharmacy" as used herein shall mean any store or other place in which drugs, medicines, chemicals, poisons, or prescriptions are compounded, dispensed, or sold at retail, or which uses the title "drugstore." "pharmacy" or "apothecary" or any combination of such titles, or any title or description of like import: Provided, that nothing in this section shall apply to the sale of domestic remedies, patent and proprietary preparations, and insecticides as set out and provided for in paragraph two of § 90-71. (1927, c. 28, s. 1)

§ 90-76. Substitution of drugs, etc., prohibited.—Any person or corporation engaged in the business of selling drugs, medicines, chemicals, or preparations for medical use or of compounding or dispensing physicians' prescriptions, who shall, in person or by his or its agents or employees, or as agent or employee of some other person, knowingly sell or deliver to any person a drug, medicine, chemical preparation for medicinal use, recognized or authorized by the latest edition of the United States Pharmacopæia and National Formulary, or prepared according to the private formula of some individual or firm, other or different from the drug, medicine, chemical or preparation for medicinal use, recognized or authorized by the latest edition of the United States Pharmacopæia and National Formulary, or prepared according to the private formula of some individual or firm, ordered or called for by such person, or called for in a physician's prescription, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine or imprisonment, or both, at the discretion of the court: Provided, that this section shall apply to registered drugstores and their employees only. (1937, c. 59.)

Part 2. Dealing in Specific Drugs Regulated.

§ 90-77. Poisons; sales regulated; label; penalties. — It shall be unlawful for any persons to sell or deliver to any person any of the following described substances or any poisonous compound, combination, or preparation thereof, to wit: The compounds and salts of arsenic, antimony, lead, mercury, silver and zinc, oxalic and hydrocyanic acids and their salts, the concentrated mineral acids, carbolic acid, the essential oils of almonds, pennyroyal, tansy and savine, croton oil, creosote, chloroform, chloral hydrate, cantharides, or any aconite, bel-

ladonna, bitter almonds, colchicum, cotton root, conium, cannabis indica, digitalis, hyoscyamus, nux vomica, opium, ergot, cannabis stramonius, or any of the poisonous alkaloids or alkaloidal salts or other poisonous principles derived from the foregoing, or cocaine or any other poisonous alkaloids or their salts, or any other virulent poisons, except in the manner following: It shall first be learned by due inquiry that the person to whom delivery is made is aware of the poisonous character of the substance, and that it is desired for a lawful purpose, and the box, bottle, or other package shall be plainly labeled with the name of the substance, the word "Poison," and the name of the person or firm dispensing the substance.

Before a delivery is made of any of the following substances, to wit, the compounds and salts of arsenic, antimony and mercury, hydrocyanic acid and its salts, strychnine and its salts, and the essential oil of bitter almonds, there shall be recorded in a book kept for the purpose the name of the article, the quantity delivered, the purpose for which it is required as represented by the purchaser, the date of delivery, the name and address of the purchaser, the name of the dispenser, which book shall be preserved for at least five years and shall at all times be open to the inspection of the proper officers of the law: Provided, that the foregoing provision shall not apply to articles dispensed upon the order of persons believed by the dispenser to be lawfully authorized practitioners of medicine or dentistry: Provided, also, that the record of sale and delivery above mentioned shall not be required of manufacturers and wholesalers who shall sell any of the foregoing substances at wholesale; but the box, bottle, or other package containing such substances, when sold at wholesale, shall be properly labeled with the name of the substance, the word "Poison," and the name and address of the manufacturer or wholesaler: Provided further, that it shall not be necessary to place a poison label upon, or to record the delivery of, the sulphide of antimony or the dioxide or carbonate of zinc or lead, or of colors ground in oil and intended for use as paint, or Paris green, when dispensed in the original package of the manufacturer or wholesaler, or calomel, paregoric, or other preparation of opium containing less than two grains of opium to the fluid ounce, nor in the case of preparations containing any of the substances named in this section when in a single box, bottle, or other package, or when the bulk of two fluid ounces or the weight of two avoirdupois ounces does not contain more than an adult medicinal dose of such poisonous substance.

If any person shall sell or deliver to any person any poisonous substance specified in this section without labeling the same and recording the delivery thereof in the manner prescribed, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars. (1905, c. 108, ss. 20, 28; Rev., ss. 3655, 4489; C. S., s. 6671.)

90-78. Certain patent cures and devices; sale and advertising forbidden.—It shall be unlawful for any person, firm, association, or corporation in the State, or any agent thereof, to sell or offer for sale any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device whose claims for the cure or treatment of disease are false or fraudulent; and it shall be unlawful for any person, firm, association, or corporation in the State, or agent thereof, to publish in any manner, or by any means, or cause to be published, circulated, or in any way placed before the public any advertisement in a newspaper or other publication or in the form of books, pamphlets, handbills, circulars, either printed or written, or by any drawing, map, print, tag, or by any other means whatsoever, any advertisement of any kind or description offering for sale or commending to the public any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device for the treatment of disease, when the North Carolina Board of Health shall declare that such device is without value in the treatment of disease.

Any person, firm, association, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars for each offense. Each sale, offer for sale, or publication of any advertisement for sale of any of the medicines, remedies, or devices mentioned in this section shall constitute a separate offense. (1917, c. 27, ss. 1, 2, 3; C. S., s. 6684.)

- § 90-79. Certain patent cures and devices; enforcement of law.— To provide for the efficient enforcement of § 90-78, the same shall be under the supervision and management of the North Carolina Board of Pharmacy, and it shall be the duty of all registered pharmacists to report immediately any violations thereof to the secretary of the Board of Pharmacy, and any willful failure to make such report shall have the effect of revoking his license to practice pharmacy in this State. (1917, c. 27, ss. 4, 5; C. S., s. 6685.)
- § 90-80. Department of Agriculture to analyze patent medicines.—The chemists and other experts of the Department of Agriculture shall, under such rules and regulations as may be prescribed by the Board of Pharmacy, and upon request of the secretary of said Board, make an analytical examination of all samples of drugs, preparations, and compounds sold or offered for sale in violation of §§ 90-78 and 90-79. (1917, c. 27, s. 6; C. S., s. 6686.)
- § 90-81. Hypnotic drugs defined and enumerated. In §§ 90-81 to 90-85, unless the context otherwise requires, the words "hypnotic drug" include:

Sulphonmethane (sulphonal).
Sulphonethylmethane (trional).

Diethyl sulphonedrethylmethane (tetronal).

Dietyl barbituric acid (barbital), or any of the foregoing by whatsoever trade name or designation; or any compound, preparation, mixture or solution thereof; or any salt or derivative thereof or of barbituric acid possessing hypnotic properties or effects.

Chloral hydrate or any mixture or solution thereof containing twenty grains or more thereof to the fluid ounce. (1931, c. 162, s. 1.)

- § 90-82. Sale prohibited except by physicians and pharmacists.— No person other than a licensed pharmacist, a duly licensed physician, doctor of dental surgery, or doctor of veterinary surgery shall sell or offer to sell any hypnotic drug to consumers or have such drug in his possession with intent to sell or give away to consumers. (1931, c. 162, s. 2.)
- § 90-83. Limitation on quantity that may be sold; exception; record of sales.—No hypnotic drug as defined in §§ 90-81 to 90-85 may be sold in quantities exceeding twelve therapeutic doses, except to persons known to be suffering with epilepsy: Provided, however, that nothing in §§ 90-81 to 90-85 shall apply to prescriptions of duly licensed physicians, doctors of dental surgery, or doctors of veterinary surgery.

Any person dispensing any hypnotic drug coming under the provisions of §§ 90-81 to 90-85, other than upon prescription, shall record in a book kept for the purpose the name of the article sold, the quantity delivered, the date of delivery, the name and address of the purchaser and the name of the dispenser, which record shall at all times be open to the inspection of the proper officer of the law. (1931, c. 162, s. 3.)

§ 90-84. Dispensing of drugs by physicians in lawful practice.— Nothing in §§ 90-81 to 90-85 shall be construed to limit the sale of hypnotic drugs to, nor to the dispensing of hypnotic drugs in the course of their professional practice by, duly licensed physicians, doctors of dental surgery or doctors of veterinary surgery lawfully practicing their profession in this State, or to registered retail or wholesale pharmacists, or to hospitals and other institutions for the treatment of defective, afflicted, sick and injured persons. (1931, c. 162, s. 4.)

- § 90-85. Violation of §§ 90-81 to 90-85 a misdemeanor.—Any person who shall violate any provision of §§ 90-81 to 90-85 shall be deemed guilty of a misdemeanor and upon conviction therefor for the first offense shall be fined not more than twenty-five dollars, and upon conviction of the second offense shall be fined not more than one hundred dollars. (1931, c. 162, s. 5.)
- § 90-85.1. Enjoining illegal practices.—The Board of Pharmacy may, if it shall find that any person is violating any of the provisions of this article, and after notice to such person of such violation, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this article, the court may issue an order restraining any further violations thereof. All such actions by the Board for injunctive relief shall be governed by the provisions of article 37 of the chapter on "Civil Procedure:" Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under any of the provisions of this article. (1947, c. 229.)

Editor's Note.-For brief comment on this section, see 25 N. C. Law Rev. 429.

ARTICLE 5.

Narcotic Drug Act.

§ 90-86. Title of article.—This article may be cited as the Uniform Narcotic Drug Act. (1935, c. 477, s. 26.)

§ 90-87. Definitions.—The following words and phrases as used in this article shall have the following meanings unless the context otherwise requires:

(a) "Person" includes any corporation, association, copartnership or one or

more individuals.

(b) "Physician" means any person authorized by law to practice medicine in this State and any other person authorized by law to treat sick and injured human beings in this State and to use narcotic drugs in connection with such treatment.

(c) "Dentist" means any person authorized by law to practice dentistry in this

State.

(d) "Veterinarian" means any person authorized by law to practice veterinary

in this State.

(e) "Manufacturer" means a person who by compounding, mixing, cultivating. growing or other process produces or prepares narcotic drugs, but does not include a pharmacist who compounds narcotic drugs to be sold or dispensed on prescription.

(f) "Wholesaler" means a person who supplies narcotic drugs that he himself has not produced or prepared, on official written order, but not on prescription.

(g) "Pharmacist" means a registered pharmacist of this State.

(h) "Pharmacy owner" means the owner of a store or other place of business where narcotic drugs are compounded or dispensed by a registered pharmacist; but nothing in this article contained shall be construed as conferring on a person who is not registered or licensed as a pharmacist any authority, right or privilege that is not granted to him by the pharmacy laws of this State.

(i) "Hospital" means an institution for the care and treatment of the sick and injured, approved by the State Board of Pharmacy as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under

the direction of a physician, dentist or veterinarian.

(j) "Laboratory" means a laboratory to be entrusted with the custody of nar-

cotic drugs and the use of narcotic drugs for scientific, experimental and medical purposes and for purposes of instruction approved by the State Board of Pharmacy.

(k) "Sale" includes barter, exchange or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant or

employee.

(1) "Coca leaves" includes cocaine and any compound, manufacture, salt, derivative, mixture or preparation of coca leaves, except derivatives of coca leaves which do not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

(m) "Opium" includes morphine, codeine and heroin and any compound, man-

ufacture, salt, derivative, mixture, or preparation of opium.

(n) "Cannabis" includes the following substances under whatever means they may be designated:

(1) The dried flowering or fruiting tops of the pistillate plant cannabis sativa

L. from which the resin has not been extracted;

(2) The resin extracted from such tops; and

(3) Every compound, manufacture, salt, derivative, mixture, or preparation of such resin or of such tops from which the resin has not been extracted; and

(4) Peyote or mara huanna.

(o) "Narcotic drugs" means coca leaves, opium, cannabis, and every substance not chemically distinguishable from them.

(p) "Federal narcotic law" means the laws of the United States relating to

opium, coca leaves and other narcotic drugs.

(q) "Official written order" means an order written on a form provided for that purpose by the United States Commissioner of Narcotics, under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law.

(r) "Dispense" includes distribute, leave with, give away, dispose of or deliver.

(s) "Registry number" means the number assigned to each person registered under the federal narcotic laws. (1935, c. 477, s. 1.)

Editor's Note.—For analysis of article, see 13 N. C. Law Rev. 403.

Applied in State v. Williams, 210 N. C. 159, 185 S. E. 661 (1936).

§ 90-88. Manufacture, sale, etc., of narcotic drugs regulated.—It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this article. (1935, c. 477, s. 2.)

Indictment Quashed for Uncertainty.—Where the defendant was indicted under this section, the indictment following the words of the section and charging defendant in one count with the commission of the several acts forbidden, the several offenses being charged by the use of the disjunctive "or," it was held that it was impossible to ascertain from the indict-

ment which of the several separate offenses defendant was charged with committing, the indictment failing to charge the commission of each of them, since the disjunctive "or" is used, and defendant's motion to quash the indictment for uncertainty should have been allowed. State v. Williams, 210 N. C. 159, 185 S. E. 661 (1936).

- § 90-89. Conditions of sale of drugs.—A duly licensed manufacturer or wholesaler may sell and dispense narcotic drugs to any of the following persons but only on official written orders:
 - (a) To a manufacturer, wholesaler, pharmacist or pharmacy owner.

(b) To a physician, dentist or veterinarian.

(c) To a person in charge of a hospital, but only for use by or in that hospital.

(d) To a person in charge of a laboratory, but only for use in that laboratory for scientific and medicinal purposes.

'A duly licensed manufacturer or wholesaler may sell narcotic drugs to any of

the following persons:

(a) On a special written order accompanied by a certificate of exemption, as required by the federal narcotic laws, to a person in the employ of the United States government or of any state, territory, district, county, municipality, or insular government, purchasing, receiving, possessing or dispensing narcotic drugs

by reason of his official duties.

(b) To a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed for the actual medical needs of persons on board such ship or aircraft when not in port, provided such narcotic drug shall be sold to the master of such ship or person in charge of such aircraft only in pursuance of a special order form approved by a commanding medical officer or acting assistant surgeon of the United States Public Health Service.

(c) To a person in a foreign country if the provisions of the federal narcotic

laws are complied with. (1935, c. 477, s. 3.)

- § 90-90. Execution of written orders; use in purchase; preserving copies for inspection.—An official written order for any narcotic drug shall be signed in duplicate by the person giving said order or by his duly authorized agent. The original shall be presented to the person who sells or dispenses the narcotic drug or drugs named therein. In the event of the acceptance of such order by said person, each party to the transaction shall preserve his copy of such order for a period of two years, in such a way as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this article. It shall be deemed a compliance with this section if the parties to the transaction have complied with the federal narcotic laws respecting the requirements governing the use of order forms. (1935, c. 477, s. 4.)
- § 90-91. Lawful possession of drugs.—Possession of or control of narcotic drugs obtained as authorized in this article shall be lawful if obtained in the regular course of business, occupation, profession, employment or duty of the possessor. (1935, c. 477, s. 5.)
- § 90-92. Dispensing of drugs regulated.—A person in charge of a hospital or of a laboratory, or in the employ of this State or of any other state, or of any political subdivisions thereof, and the master or other proper officer of a ship or aircraft, who obtains narcotic drugs under the provisions of this article or otherwise shall not administer, nor dispense, nor otherwise use such drugs within this State except within the scope of his employment or official duty and then only for scientific or medicinal purposes and subject to the provisions of this article. (1935, c. 477, s. 6.)
- § 90-93. Sale of drugs on doctor's prescription.—A pharmacist in good faith may sell and dispense narcotic drugs to any person upon the written prescription of a physician, dentist or veterinarian, provided it is properly executed, dated and signed by the person prescribing on the day when issued and bearing the full name and address of the patient for whom, or of the owner of the animal for which, the drug is dispensed, and the full name, address and registry number under the federal narcotic laws of the person so prescribing if he is required by those laws to be so registered. If the prescription be for an animal, it shall state the species of animal for which the drug is prescribed. A person filling the prescription shall write the date of filling and his own signature on the face of the pharmacy in which it is filled for a period of two years so as to be readily accessible for the inspection of any officers engaged in the enforcement of this article. The prescription shall not be refilled.

The legal owner of any stock of narcotic drugs in a pharmacy, upon discontinuance of dealing in said drugs, may sell said stock to a manufacturer, wholesaler.

pharmacist or pharmacy owner but only upon an official written order.

A pharmacist, only upon an official written order, may sell to a physician, dentist or veterinarian in quantities not exceeding one ounce at any one time, aqueous

or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than twenty per centum (20%) of the complete solution, to be used for medicinal purposes. (1935, c. 477, s. 7.)

Liability to Husband for Injury to Wife.

—Under former § 6677 of the Consolidated Statutes, relating to the subject matter of this section, it was held that one who, despite the protests and warnings of a hus-

band, persistently sold drugs to the latter's wife, was liable in damages to the husband for the injuries so sustained. Holleman v. Harward, 119 N. C. 150, 25 S. E. 927 (1896).

- § 90-94. Prescribing, administering or dispensing by physicians or dentists.—A physician or a dentist, in good faith and in the course of his professional practice, only, may prescribe on a written prescription, administer, or dispense narcotic drugs or may cause the same to be administered by a nurse or interne under his direction and supervision. Such a prescription shall be dated and signed by the person prescribing on the day when issued and shall bear the full name and address of the patient for whom the narcotic drug is prescribed and the full name, address and registry number under the federal narcotic laws of the person prescribing, providing he is required by those laws to be so registered. (1935, c. 477, s. 8.)
- § 90-95. Prescribing, administering or dispensing by veterinarians.—A veterinarian, in good faith and in the course of his professional practice only not for use by a human being, may prescribe on a written prescription, administer and dispense narcotic drugs and he may cause them to be administered by an assistant or orderly under his direction and supervision. Such a prescription shall be dated and signed by the person prescribing on the day when issued and shall bear the full name and address of the owner of the animal, the species of the animal for which the narcotic drug is prescribed and the full name, address and registry number under the federal narcotic laws of the person prescribing, provided he is required by those laws to be so registered. (1935, c. 477, s. 8.)
- § 90-96. Returning unused portions of drugs.—Any person who has obtained from a physician, dentist or veterinarian any narcotic drug for administration to a patient during the absence of such physician, dentist or veterinarian shall return to such physician, dentist or veterinarian any unused portion of such drug when it is no longer required by the patient. (1935, c. 477, s. 8.)

§ 90-97. Article not applicable in certain cases.—Except as otherwise herein specifically provided, this article shall not apply to the following cases:

(1) Prescribing, administering, compounding, dispensing or selling at retail of any medicinal preparation that contains in one fluid ounce, or if a solid or semi-solid preparation, in one avoirdupois ounce (a) not more than two grains of opium, (b) not more than one-quarter grain of morphine or of any of its salts, (c) not more than one grain of codeine, or of any of its salts, (d) not more than one-eighth of a grain of heroin or of any of its salts, (e) not more than one-half of a grain of extract of cannabis nor more than one-half of a grain of any more potent derivative or preparation of cannabis.

(2) Prescribing, administering, compounding, dispensing or selling at retail of liniments, ointments, and other preparations that are susceptible of external use only and that contain narcotic drugs in such combinations as prevent their being readily extracted from such liniments, ointments, or preparations, except that this article shall apply to all liniments, ointments, and other preparations that con-

tain coca leaves in any quantity or combinations.

(3) The exemptions authorized by this section shall be subject to the follow-

ing conditions:

(a) The medicinal preparation, or the liniment, ointment, or other preparation susceptible of external use only, prescribed, administered, dispensed, or sold, shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone.

(b) Such preparation shall be prescribed, administered, compounded, dispensed and sold in good faith as a medicine, and not for the purpose of evading the pro-

visions of this article.

(4) Nothing in this section shall be construed to limit the kind and quantity of any narcotic drug that may be prescribed, administered, compounded, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, compounded, dispensed, or sold, in compliance with the general provisions of this article. (1935, c. 477, s. 9.)

§ 90-98. Records of drugs dispensed; records of manufacturers and wholesalers; records of pharmacists; written orders unnecessary for certain drugs; invoices rendered with sales.—Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this section if any such person using small quantities or solutions or other preparations of such drugs for local application shall keep a record of the quantity, character, and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients.

Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown, or by any other process produced or prepared, and of all narcotic drugs received and disposed of by them, in accordance with the

provisions of this section.

Pharmacists and pharmacy owners shall keep records of all narcotic drugs received and disposed of by them, in accordance with the provisions of this article.

The keeping of a record required by or under the federal narcotic law shall constitute the only record required to be kept by every person who purchases for

resale or who sells narcotic drug preparations exempted.

Written orders shall not be required for the sale of cannabis indica or cannabis sativa, or peyote and mara huanna, and the provisions of the article in respect to written orders and records shall not apply to cannabis indica, cannabis sativa, peyote and mara huanna, but manufacturers and wholesalers of cannabis indica, cannabis sativa, peyote and mara huanna shall be required to render with every sale of cannabis indica or cannabis sativa, peyote and mara huanna, an invoice, whether such sale be for cash or on credit; and such invoice shall contain the date of such sale, the name and address of the purchaser, and the amount of cannabis indica or cannabis sativa or peyote and mara huanna so sold.

Every purchaser of cannabis indica, cannabis sativa or peyote and mara huanna from a wholesaler or manufacturer shall be required to keep the invoice rendered

with such purchase for a period of two years. (1935, c. 477, s. 10.)

- § 90-99. Labeling packages containing drugs.—Whenever a manufacturer sells or disposes of a narcotic drug and whenever a wholesaler sells and dispenses a narcotic drug in a package prepared by him, he shall securely affix to each package in which that drug is contained a label showing in legible English the name and address of the vendor and the quantity, kind and form of narcotic drug contained therein. No person, except a pharmacist for the purpose of filling a prescription under this article, shall alter, deface or remove any label so affixed. (1935, c. 477, s. 11.)
- § 90-100. Labeling containers of drugs dispensed on prescriptions.—Whenever a pharmacist sells or dispenses any narcotic drug on prescription issued by a physician, dentist, or veterinarian he shall affix to the container in which such drug is sold or dispensed, a label showing his own name, address, and registry number, or the name, address and registry number of the pharmacist or

pharmacy owner for whom he is lawfully acting; the name and address of the patient, or, if the patient is an animal, the name and address of the owner of the animal and the species of the animal; the name, address and registry number of the physician, dentist or veterinarian, by whom the prescription was written; and such directions as may be stated on the prescription. No person shall alter, deface or remove any label so affixed as long as any of the original contents remain. (1935, c. 477, s. 11.)

- § 90-101. Lawful possession in original containers.—A person to whom or for whose use any narcotic drug has been prescribed, sold or dispensed by a physician, dentist, pharmacist, or other person authorized under the provisions of this article, the owner of any animal for which any such drug has been prescribed, sold, or dispensed by a veterinarian, may lawfully possess it only in the container in which it was delivered to him by the person selling or dispensing the same. (1935, c. 477, s. 12.)
- § 90-102. Common carriers and warehousemen excepted; other persons exempt.—The provisions of this article restricting the possessing and having control of narcotic drugs shall not apply to common carriers or to warehousemen while engaged in lawfully transporting or storing such drugs, or to any employees of the same acting within the scope of his employment; or to public officers or employees in the performance of their official duties requiring possession or control of narcotic drugs; or to temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officers in performing their official duties. (1935, c. 477, s. 13.)
- § 90-103. Places unlawfully possessing drugs declared nuisances.—Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same shall be deemed a common nuisance. No person shall keep or maintain such common nuisance. (1935, c. 477, s. 14.)

Suit to Abate Will Not Lie.—A suit cannot be maintained to abate a public nuisance as defined by this section, since §§ 19-2 to 19-8 are not applicable, and the

Narcotic Drug Act does not provide the remedy of abatement. State v. Townsend, 227 N. C. 642, 44 S. E. (2d) 36 (1947).

- § 90-104. Forfeiture and disposition of drugs unlawfully possessed.—All narcotic drugs the lawful possession of which is not established, or the title to which cannot be ascertained, which have come into the custody of a peace officer, shall be forfeited, and disposed of as follows:
- (a) The court or magistrate having jurisdiction shall immediately notify the State Board of Pharmacy and unless otherwise requested within fifteen days by the State Board of Pharmacy in accordance with subsection (b) of this section shall order such narcotic drugs forfeited and destroyed. A record of the place where said drugs were seized, of the kinds and quantities of drugs so destroyed, and of the time, place and manner of destruction, shall be kept, and a return under oath, reporting said destruction, shall be made to the court or magistrate and to the United States Commissioner of Narcotics, by the officer who destroys them.

(b) Upon written application by the State Board of Pharmacy the court or magistrate by whom the forfeiture of narcotic drugs has been decreed may order the delivery of them except heroin and its salts and derivatives to said State Board of Pharmacy for the delivery of them.

of Pharmacy for distribution or destruction, as hereinafter provided.

(c) Upon application by any hospital within this State, not operated for private gain, the State Board of Pharmacy may in its discretion deliver any narcotic drugs that have come into its custody by authority of this section to the applicant for medicinal use. The State Board of Pharmacy may from time to time deliver ex-

cess stocks of such drugs to the United States Commissioner of Narcotics, or shall

destroy the same.

- (d) The State Board of Pharmacy shall keep a full and complete record of all drugs received and of all drugs disposed of, showing the exact kinds, quantities and forms of such drugs; the persons from whom received and to whom delivered; by whose authority received, delivered and destroyed; and the dates of the receipt, disposal, or destruction, which record shall be open to inspection by all federal and State officers charged with the enforcement of federal and State narcotic laws. (1935, c. 477, s. 15.)
- § 90-105. Prescriptions, stocks, etc., open to inspection by officials.—Prescriptions, orders and records, required by this article, and stocks of narcotic drugs shall be open for inspection only to federal, State, county and municipal officers, whose duty it is to enforce the laws of this State or of the United States relating to narcotic drugs. No officer having knowledge by virtue of his office of any such prescription, order or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing board or officer to which prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party. (1935, c. 477, s. 16.)
- § 90-106. Fraudulent attempts to obtain drugs prohibited.—No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of false name or the giving of a false address.
- (a) Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

(b) No person shall willfully make a false statement in any prescription, order.

report, or record, required by this article.

(c) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, pharmacy owner, physician, dentist, veterinarian, or other authorized person.

(d) No person shall make or utter any false or forged prescription or written

order.

- (e) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs. (1935, c. 477, s. 17.)
- § 90-107. Application of certain restrictions. The provisions of § 90-106 shall apply to all transactions relating to narcotic drugs under the provisions of § 90-97 in the same way as they apply to transactions under all other sections. (1935, c. 477, s. 18.)
- § 90-108. Possession of hypodermic syringes and needles regulated.—No person except a manufacturer or a wholesaler or a retail dealer in surgical instruments, pharmacist, physician, dentist, veterinarian, nurse or interne shall at any time have or possess a hypodermic syringe or needle or any instrument or implement adapted for the use of habit-forming drugs by subcutaneous injections and which is possessed for the purpose of administering habit-forming drugs, unless such possession be authorized by the certificate of a physician issued within the period of one year prior hereto. (1935, c. 477, s. 19.)
- § 90-109. Burden on defendant to prove exemption.—In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this article, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this article, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant. (1935, c. 477, s. 20.)

- § 90-110. State Board of Pharmacy and peace officers to enforce article.—It is hereby made the duty of the State Board of Pharmacy, its officers, agents, inspectors and representatives, and of all peace officers within the State, and of all State's attorneys, to enforce all provisions of this article, except those specifically delegated, and to co-operate with all agencies charged with the enforcement of the laws of the United States, of this State and of all other states, relating to narcotic drugs. (1935, c. 477, s. 21.)
- § 90-111. Penalties for violation.—Any person violating any provision of this article shall, upon conviction, be punished for the first offense by a fine not exceeding one thousand (\$1,000.00) dollars or by imprisonment for not exceeding three years, or both; and for any subsequent offense by a fine not exceeding three thousand dollars (\$3,000.00) or by imprisonment for not exceeding five years, or both. (1935, c. 477, s. 22.)
- § 90-112. Double jeopardy.—No person shall be prosecuted for a violation of any provision of this article if such person has been acquitted or convicted under the federal narcotic laws of the same act or commission, which, it is alleged, constitutes a violation of this article. (1935, c. 477, s. 23.)
- § 90-113. Construction of article.—This article shall be so interpreted and construed as to effectuate its general purpose and to make uniform the laws of those states which enact it. (1935, c. 477, s. 25.)

ARTICLE 6.

Optometry.

§ 90-114. Optometry defined.—The practice of optometry is hereby defined to be the employment of any means, other than the use of drugs, medicines, or surgery, for the measurement of the powers of vision and the adaptation of lenses for the aid thereof; and in such practices as above defined, the optometrist may prescribe, give directions or advice as to the fitness or adaptation of a pair of spectacles, eyeglasses or lenses for another person to wear for the correction or relief of any condition for which a pair of spectacles, eyeglasses or lenses are used, or to use or permit or allow the use of instruments, test cards, test types, test lenses, spectacles or eyeglasses or anything containing lenses, or any device for the purpose of aiding any person to select any spectacles, eyeglasses or lenses to be used or worn by such last mentioned person or by any other person. (1909, c. 444, s. 1; C. S., s. 6687; 1923, c. 42, s. 1.)

Editor's Note.—The 1923 amendment added the part of this section following the semicolon.

For comment on article, see 1 N. C. Law \cdot Rev. 300.

This article was intended to regulate the practice of optometry, and not the optical trade. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8 (1948).

This section is in substantial accord

with the definitions given in other jurisdictions. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8 (1948).

The duplication of an ophthalmic lens, or the duplication or replacement of a frame or mounting for such lenses, does not constitute the practice of optometry as defined in this section. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8 (1948). See note to § 90-115.

§ 90-115. Practice without registration unlawful.—After the passage of this article it shall be unlawful for any person to practice optometry in the State unless he has first obtained a certificate of registration and filed the same, or a certified copy thereof, with the clerk of the superior court of his residence, as hereinafter provided. Within the meaning of this article, a person shall be deemed as practicing optometry who does, or attempts to, sell, furnish, replace, or duplicate, a lens, frame, or mounting, or furnishes any kind of material or apparatus for ophthalmic use, without a written prescription from a person authorized under the laws of North Carolina to practice optometry, or from a person authorized under the laws of North Carolina to practice medicine: Provided.

however, that the provisions of this section shall not prohibit persons or corporations from selling completely assembled spectacles, without advice or aid as to the selection thereof, as merchandise from permanently located or established places of business, nor shall it prohibit persons or corporations from making mechanical repairs to frames for spectacles; nor shall it prohibit any person, firm, or corporation engaged in grinding lenses and filling prescriptions from replacing or duplicating lenses on original prescriptions issued by a duly licensed optometrist, and oculist. (1909, c. 444, s. 2; C. S., s. 6688; 1935, c. 63.)

Editor's Note.—The 1935 amendment added all of this section beginning with the

second sentence.

Section Is Invalid in Part.—This section is invalid in so far as it declares that a person is practicing optometry when he replaces or duplicates an ophthalmic lens, or replaces or duplicates the frame or mounting for such lens, for these acts do not constitute the practice of optometry as defined by § 90-114, and the proscription has no reasonable relation to the public health, safety or welfare. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8 (1948). See Const., Art. I, §§ 1, 17, 31.

Effect of Definition in § 90-114.—The

Effect of Definition in § 90-114.—The mere fact that this section provides that a person shall be deemed to be practicing optometry if he duplicates a lens or replaces or duplicates a frame or mounting,

without a prescription, does not make it so, unless such duplication or replacement constitutes the practice of optometry within the definition thereof in § 90-114. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8 (1948).

What Optician May Do.—So long as an optician confines his work to the mere mechanical process of duplicating lenses, replacing or duplicating frames and mountings, "making mechanical repairs to frames for spectacles," and filling prescriptions issued by a duly licensed optometrist or oculist, and does not in any manner undertake "the measurement of the powers of vision and the adaptation of lenses for the aid thereof," he is not practicing optometry. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8 (1948).

§ 90-116. Board of Examiners in Optometry.—There is hereby created a board, whose duty it shall be to carry out the purposes and enforce the provisions of this article, and which shall be styled the "North Carolina State Board of Examiners in Optometry." This Board shall be elected by the North Carolina State Optometric Society and commissioned by the Governor and shall consist of five regular optometrists who are members of the North Carolina State Optometric Society and who have been engaged in the practice of optometry in the State for five years. The terms of the members shall be as follows: One for one year, one for two years, one for three years, one for four years, one for five years. The terms of members thereafter appointed shall be for five years. The members of the Board, before entering upon their duties, shall respectively take all oaths taken and prescribed for other State officers, in the manner provided by law, which shall be filed in the office of the Secretary of State, and the Board shall have a common seal. The North Carolina State Optometric Society shall have the power to fill all vacancies on said Board for unexpired terms, and members so elected shall be commissioned by the Governor. (1909, c. 444, s. 3; 1915, c. 21, s. 1; C. S., s. 6689; 1935, c. 63.)

Editor's Note.—The 1935 amendment added the last two sentences of the section.

§ 90-117. Organization; meetings and powers thereat; records, witnesses and evidence.—The Board of Examiners shall choose, at the first regular meeting and annually thereafter, one of its members as president and one as secretary and treasurer. The Board shall make such rules and regulations, not inconsistent with law, as may be necessary to the proper performance of its duties, and each member may administer oaths and take testimony concerning any matter within the jurisdiction of the Board. A majority of the Board shall constitute a quorum. The Board shall meet at least once a year, the times and places of meeting to be designated by the president and secretary. The secretary of the Board shall keep a full record of its proceedings, which shall at all reasonable times be open to public inspection. The president, secretary-treasurer, or any member of

the Board shall have power in connection with any matter within the jurisdiction of the Board to summon and examine witnesses under oath and to compel their attendance and the production of books, papers, or other documents or writings deemed by it necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary-treasurer or the president of the Board and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness who shall refuse or neglect to appear in obedience thereto or to testify or produce books, papers, or other documents or writings required shall be liable to punishment for contempt by the Board. Said Board shall pay to any witness subpoenaed before it the fees and per diem as paid witnesses in civil actions in the superior court of the county where such hearing is held. (1909, c. 444, s. 4; C. S., s. 6690; 1935, c. 63.)

Editor's Note.—The 1935 amendment two to one a year and added the last three

reduced the number of meetings from sentences.

§ 90-118. Examination for practice; prerequisites; registration.— Every person, before beginning to practice optometry in this State after the passage of this article, shall pass an examination before the Board of Examiners. The examination shall be confined to such knowledge as is essential to practice of optometry. Every applicant for examination at the time of examination must comply with the following conditions:

1. He must be twenty-one years of age: Provided, that the examination may be given to any applicant who will be twenty-one years of age before the next regular period for giving examinations: Provided, further, that no license shall be

issued until the applicant reaches twenty-one years of age.

2. He shall file with the secretary of the Board a certificate of good moral character, signed by two reputable citizens of this State; but an applicant from another state may have such certificate signed by any state officer of the state from which he comes.

3. He shall satisfy the Board that he has been in actual attendance in approved school of optometry, and that he holds a certificate of graduation from said school, which school shall be approved by the North Carolina Board of Examiners in Op-

tometry

4. He must pay to the Board for the use of the Board the sum of twenty dollars, and if he shall successfully pass the examination he shall pay to the secretary for the use of the Board a further sum of five dollars on the issuance to him of the certificate: Provided, the applicant may stand any subsequent examination by

paying an additional fee of five dollars.

Every person successfully passing the examination shall be registered in the Board registry, which shall be kept by the secretary, as licensed to practice optometry, and he shall also receive a certificate of registration, to be signed by the president and secretary of the Board: Provided, that any person holding a certificate by examination to practice optometry in another state where the qualifications prescribed are equal to the qualifications required in this State may be licensed without examination on the same conditions and on the payment of the same fees as are required of other applicants. (1909, c. 444, s. 5; 1915, c. 21, ss. 2, 3, 4; C. S., s. 6691; 1923, c. 42, ss. 2, 3; 1935, c. 63; 1949, c. 357.)

Editor's Note.—The 1935 amendment changed the requirements of subsection 3 and substituted at the end of subsection 4 the words "by paying an additional fee of five dollars" for the words "without paying another fee." And the 1949 amendment added the provisos to subsection 1.

Discontinuing the practice of optometry for eighteen years will not constitute an abandonment of the license to practice so as to make the optometrist a "beginner" within the meaning of this section when no action was taken by the Board as provided in § 90-123, since such revocation of the certificate is the only method prescribed by statute for foreclosing the right to practice the profession after an optometrist has been admitted to such practice. Mann v. North Carolina State Board of Examiners, 206 N. C. 853, 175 S. E. 281 (1934).

- § 90-119. Persons in practice before passage of statute.—Every person who had been engaged in the practice of optometry in the State for two years prior to the date of the passage of this article shall hereafter file an affidavit as proof thereof with the Board. The secretary shall keep a record of such persons who shall be exempt from the provisions of the preceding section. Upon payment of three dollars he shall issue to each of them certificates of registration without the necessity of an examination. Failure on the part of a person so entitled within six months of the enactment of this article to make written application to the Board for the certificate of registration accompanied by a written statement, signed by him and duly verified before an officer authorized to administer oaths within this State, fully setting forth the grounds upon which he claims such certificate, shall be deemed a waiver of his right to a certificate under the provisions of this section. A person who has thus waived his right may obtain a certificate thereafter by successfully passing examination and paying a fee as provided herein. (1909, c. 444, ss. 6, 7, 9; C. S., s. 6692.)
- § 90-120. Filing of certificate by licensee; fees; failure to file; certified copies.—Each recipient of the certificate of registration shall present the same for record to the clerk of the superior court of the county in which he resides, and shall pay a fee of fifty cents for recording the same. The clerk shall record it in a book to be provided by him for that purpose. Any person so licensed, before engaging in the practice of optometry in any other county, shall file the certificate for record with the clerk of the superior court of the county in which he desires to practice, and pay the clerk for recording it a fee of fifty cents. Any failure, neglect, or refusal on the part of a person holding a certificate to file it for record, for thirty days after the issuance thereof, shall forfeit the certificate and it shall become null and void. Upon the request of any person entitled to a certificate of registration the Board shall issue a certified copy thereof, and upon the fact of the loss of the original being made to appear, the certified copy shall be recorded in lieu of the original, and the Board shall be entitled to a fee of one dollar for recording such certified copy. (1909, c. 444, s. 8; C. S., s. 6693.)
- § 90-121. Certificate to be displayed at office.—Every person to whom a certificate of examination or registration is granted shall display the same in a conspicuous part of his office wherein the practice of optometry is conducted. (1909, c. 444, s. 10; C. S., s. 6694.)
- § 90-122. Compensation of Board; surplus funds.—Out of the funds coming into possession of said Board each member thereof may receive as compensation the sum of ten dollars for each day he is actually engaged in the duties of his office and mileage of five cents per mile for all distances necessarily traveled in going to and coming from the meetings of the Board. Such expenses shall be paid from the fees and assessments received by the Board under the provisions of this article, and no part of the salary or other expenses of the Board shall ever be paid out of the State treasury. All moneys received in excess of per diem allowance and mileage, as above provided, shall be held by the secretary as a special fund for meeting expenses of the Board and carrying out the provisions of this article, and he shall give the State such bond as the Board shall from time to time direct for the faithful performance of his duties, and the Board shall make an annual report of its proceedings to the Governor on the first Monday in January of each year, which report shall contain an account of all moneys received and disbursed by them pursuant to this article. The secretary-treasurer shall receive from the funds of the Board such salary as may be determined by the Board. (1909, c. 444, s. 11; C. S., s. 6695; 1923, c. 42, s. 4; 1935, c. 63.)

Editor's Note.—The 1935 amendment added the last sentence of this section.

§ 90-123. Annual fees; failure to pay; revocation of license; collec-

tion by suit.—For the use of the Board in performing its duties under this article, every registered optometrist shall, in every year after the year one thousand nine hundred and thirty-seven pay to the Board of Examiners the sum of not exceeding fifteen (\$15.00) dollars, the amount to be fixed by the Board, as a license fee for the year. Such payments shall be made prior to the first day of April in each year, and in case of default in payment by any registered optometrist his certificate may be revoked by the Board at the next regular meeting of the Board after notice as herein provided. But no license shall be revoked for nonpayment if the person so notified shall pay, before or at the time of consideration, his fee and such penalty as may be imposed by the Board. The penalty imposed on any one person so notified as a condition of allowing his license to stand shall not exceed five and no/100 dollars (\$5.00). The Board of Examiners may collect any dues or fees provided for in this section by suit in the name of the Board. The notice hereinbefore mentioned shall be in writing, addressed to the person in default in the payment of dues or fees herein mentioned at his last known address as shown by the records of the Board, and shall be sent by the secretary of the Board by registered mail, with proper postage attached, at least twenty (20) days before the date upon which revocation of license is considered. and the secretary shall keep a record of the fact and of the date of such mailing. The notice herein provided for shall state the time and place of consideration of revocation of the license of the person to whom such notice is addressed. (1900). c. 444, s. 12; C. S., s. 6696; 1923, c. 42, s. 5; 1933, c. 492; 1937, c. 362, s. 1.)

Editor's Note.—The 1933 amendment rewrote this section. The 1937 amendment changed the date in the first sentence from 1932 to 1937 and increased the annual license fee from five to fifteen dollars.

The method of revoking a license as

provided by this section is exclusive and must be first resorted to and in the manner specified therein. Mann v. North Carolina State Board of Examiners, 206 N. C. 853, 175 S. E. 281 (1934).

§ 90-124. Revocation and regrant of certificate. — The Board shall have the power to make such rules and regulations, not inconsistent with the laws of the State of North Carolina, as may be necessary and proper for the regulation of the practice of the profession of optometry, and for the performance of its duties. The Board shall have the power to revoke any certificate of registration granted by it under this article for conviction of crime, habitual drunkenness, gross incompetence, contagious or infectious disease; and the Board shall likewise have the power to revoke any such certificate of registration upon the finding by the Board that the holder of such certificate has been guilty of unethical conduct or practice. Unethical practice as herein stipulated as a condition for revocation of license shall include the following:

(1) Advertising the "free examination of the eyes," "free consultation," "consultation without obligation," "free advice," or any words or phrases of similar import which convey, or are calculated to convey, the impression to the public that the eyes are examined free, or of a character tending to deceive or mislead the

public, or in the nature of "bait advertising;"

(2) Use of advertising, directly or indirectly, whether printed, radio, display, or of any other nature which seeks or solicits practice on any installment payment plan.

(3) House-to-house canvassing or peddling, directly or through any agent or employee, for the purpose of selling, fitting, or supplying frames, mounting, lenses.

or other opthalmic products.

Before any certificate shall be so revoked for any of the grounds or reasons herein set forth, the holder thereof shall be served with a written notice by any officer authorized to serve civil summons. The said notice shall inform the holder of the charge or charges against him and shall specify the day, which shall be at least 30 days from the date of the issuance of the notice, the place, and the time of the hearing before the Board. The holder of the certificate shall have an opportunity to produce testimony in his behalf, and to confront the witnesses against

him. Any person whose certificate has been revoked for any of the grounds or reasons herein set forth, or on account of nonpayment of dues, may, after the expiration of ninety days, and within two years, apply to the Board to have same regranted, and upon a showing satisfactory to the said Board, and at the discretion of the Board, license to practice optometry may be restored to such person. (1909, c. 444, s. 13; C. S., s. 6697; 1935, c. 63.)

Editor's Note.—The 1935 amendment rewrote this section.

§ 90-125. Practicing under other than own name or as a salaried or commissioned employee.—It shall be unlawful for any person licensed to practice optometry under the provisions of this article to advertise, practice, or attempt to practice under a name other than his own, except as an associate of or assistant to an optometrist licensed under the laws of the State of North Carolina; and it shall be likewise unlawful for any corporation, lay body, organization, group, or lay individual to engage, or undertake to engage, in the practice of optometry through means of engaging the services, upon a salary or commission basis, of one license to practice optometry or medicine in any of its branches in this State. Likewise, it shall be unlawful for any optometrist licensed under the provisions of this article to undertake to engage in the practice of optometry as a salaried or commissioned employee of any corporation, lay body, organization, group, or lay individual. (1935, c. 63; 1937, c. 362, s. 2.)

Editor's Note. — The 1937 amendment inserted the words "or medicine in any of its branches" near the end of the first sen-

tence.

Suit to Enjoin Enforcement of Section Not Allowed by Federal Court.—Defendants had been enjoined by a State court for an alleged violation of this section. In a suit brought in the federal district court to enjoin the enforcement of this section, as violating the commerce clause and due process and equal protection clauses of the Constitution, it was held that this was a suit to enjoin the decree of a State court and was prohibited by a federal statute. Ritholz v. North Carolina State Board of Examiners, 18 F. Supp. 409 (1937).

- § 90-126. Violation of article forbidden.—Any person who shall violate any of the provisions of this article, and any person who shall hold himself out to the public as a practitioner of optometry without a certificate of registration provided for herein, shall be deemed guilty of a misdemeanor, and upon conviction may be punished by a fine of not more than one hundred dollars or imprisonment for not more than four months, or both, in the discretion of the court. (1909, c. 444, s. 14; C. S., s. 6698.)
- § 90-126.1. Board may enjoin illegal practices.—In view of the fact that the illegal practice of optometry imminently endangers the public health and welfare, and is a public nuisance, the North Carolina State Board of Optometry may, if it shall find that any person is violating any of the provisions of this article, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this article, the court shall issue an order restraining any further violations thereof. All such actions by the Board for injunctive relief shall be governed by the provisions of article thirty-seven of the chapter on "Civil Procedure:" Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under the provisions of § 90-126. (1943, c. 444.)

Editor's Note.—For comment on section, see 21 N. C. Law Rev. 324.

§ 90-127. Application of article.—Nothing in this article shall be construed to apply to physicians and surgeons authorized to practice under the laws of North Carolina, except the provisions contained in § 90-125, or prohibit per-

sons to sell spectacles, eyeglasses, or lenses as merchandise from permanently located and established places of business. (1909, c. 444, s. 15; C. S., s. 6699; 1937, c. 362, s. 3.)

Editor's Note.—The 1937 amendment inserted the reference to § 90-125.

§ 90-128. Repeal of laws; exception. — Nothing in the provisions amending §§ 90-114, 90-118, 90-122, and 90-123, shall repeal any of the provisions of § 90-127. (1923, c. 42, s. 7; C. S., s. 6699(b).)

ARTICLE 7.

Osteopathy.

§ 90-129. Osteopathy defined.—For the purpose of this article osteopathy is defined to be the science of healing without the use of drugs, as taught by the various colleges of osteopathy recognized by the North Carolina Osteopathic Society, Incorporated. (1907, c. 764, s. 8; 1913, c. 92, s. 3; C. S., s. 6700.)

Cross Reference.—As to what constitutes illegal practice of medicine by licensed osteopath, see §§ 90-18, 90-19 and notes.

Purpose of Article. — In all probability, the General Assembly enacted the statutes relating to the practice of osteopathy now embodied in this article because of the decision in State v. McKnight, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187 (1902), which recognized that osteopathy is a "mode of treatment which absolutely excludes medicines and surgery from its pathology" and held that for this reason the statutes requiring examination and license "before beginning the practice of medicine or surgery" did not apply to osteopaths. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

The distinction between the practice of osteopathy and the practice of medicine and surgery is recognized by articles 1 and 7 of this chapter. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

"Osteopathy" Does Not Involve Use of Drugs.—"Osteopathy" is the very antithesis of any science of medicine involving

the use of drugs. It is a system of treating diseases of the human body without drugs or surgery. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

The words "as taught by the various colleges of osteopathy" do not set at large the signification of "osteopathy," permitting the colleges to give it any meaning they choose. The legislature merely authorizes the colleges to determine, select, and teach the most desirable methods of doing what is comprehended within the term "osteopathy." The colleges cannot widen the scope of the osteopath's certificate so as to permit him to practice other systems of healing by the simple expedient of varying their curricula. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

In a prosecution of an osteopath for practicing medicine without a license, the State does not have the burden of showing that the administration or prescription of medicines with which defendant is charged was not taught in the recognized colleges of osteopathy. State v. Baker, 229 N. C.

73, 48 S. E. (2d) 61 (1948).

§ 90-130. Board of Examiners; membership; officers; meetings.—There shall be a State Board of Osteopathic Examination and Registration, consisting of five members appointed by the Governor, in the following manner, to wit: within thirty days after this article goes into effect the Governor shall appoint five persons who are reputable practitioners of osteopathy, selected from a number of not less than ten who are recommended by the North Carolina Osteopathic Society, and this number may be increased to fifteen, upon the request of the Governor; the recommendation of the president and secretary being sufficient proof of the appointees' standing in the profession; and said appointees shall constitute the first Board of Osteopathic Examination and Registration. Their term of office shall be so designated by the Governor that the term of one member shall expire each year. Thereafter in each year the Governor shall in like manner appoint one person to fill the vacancy in the Board thus created, from a number of not less than five, who are recommended by the State Osteopathic Society; the term of said appointee to be for five years. A vacancy occurring from any

other cause shall be filled by the Governor for the unexpired term in the same manner as last above stated. The Board shall, within thirty days after its appointment, meet in the city of Raleigh, and organize by electing a president, secretary and treasurer, each to serve for one year. Thereafter the election of said officers shall occur annually. The treasurer and secretary shall each give bond, approved by the Board, for the faithful performance of their respective duties, in such sum as the Board may from time to time determine. The Board shall have a common seal, and shall formulate rules to govern its actions; and the president and secretary shall be empowered to administer oaths. The Board shall meet in the city of Raleigh at the call of the president, in the month following the election of its officers, and in July of each succeeding year, and at such other times and places as a majority of the Board may designate. Three members of the Board shall constitute a quorum, but no certificate to practice osteopathy shall be granted on an affirmative vote of less than three. The Board shall keep a record of its proceedings, and a register of all applicants for certificates, giving the name and location of the institution granting the applicant the degree of doctor of or diploma in osteopathy, the date of his or her diploma, and also whether the applicant was rejected or a certificate granted. The record and registers shall be prima facie evidence of all matters recorded therein. (1907, c. 764, s. 1; 1913, c. 92, s. 1; C. S., s. 6701; 1937, c. 301, s. 1.)

Editor's Note.-The 1937 amendment Iy appearing after the word "osteopathy" struck out the words "or other nondruggiving school of medical practice" former-

in the next to the last sentence.

§ 90-131. Examination and certification of applicant; prerequisites.—Any person, before engaging in the practice of osteopathy in this State, shall, upon the payment of a fee of twenty-five dollars, make application for a certificate to practice osteopathy to the Board of Osteopathic Examination and Registration on a form prescribed by the Board, giving, first, his name, age (which shall not be less than twenty-one years), and residence; second, evidence that such applicant shall have, previous to the beginning of his course in osteopathy, a certificate of examination for admission to the freshman class of a reputable literary or scientific college, a diploma from a high school, academy. State normal school, college, or university, approved by aforesaid Board; third, the date of his diploma, and evidence that such diploma was granted on personal attendance and completion of a course of not less than four terms of five months each, and after July, one thousand nine hundred and seventeen, of four terms of not less than nine months each in three separate years; fourth, the name of the school or college of osteopathy from which said applicant was a graduate, and which shall have been in good repute as such at the time of the granting of his diploma, as determined by the Board. The Board may, in its discretion, accept, as the equivalent of any part or all of the second, third, and fourth requirements, evidence of five or more years reputable practice of osteopathy, provided such substitution be specified in the certificate, if the facts thus set forth, and to which the applicant shall be required to make affidavit, shall meet the requirements of the Board, as prescribed by its qualifications for the practice of osteopathy, which shall include the subjects of anatomy, physiology, physiological chemistry, toxicology, osteopathic pathology, bacteriology, osteopathic diagnosis, hygiene, osteopathic obstetrics and gynecology, minor surgery, principles and practice of osteopathy, and such other subjects as the Board may require. A physician's certificate issued by a reputable school of osteopathy to a graduate from a reputable school of medicine, after an attendance of not less than two terms of nine months each in two separate years, may be accepted by the Board on the same terms as a diploma, and the holder thereof he subject to the same regulations in all other respects as other applicants before the Board. The Board may refuse to grant a certificate to any person convicted of a felony, or of gross unprofessional conduct, or who is addicted to any vice to such a degree as to render him unfit to practice osteopathy,

and may, after due notice and hearing, revoke such certificate for like cause. (1907, c. 764, s. 2; 1913, c. 92, s. 1; C. S., s. 6702.)

practice and receive pay for the treatment of human diseases without the use of drugs, and who are not licensed osteo-

Necessity for Examination.-Those who paths, are required to take the examination and receive the license provided for by statute. State v. Siler, 169 N. C. 314, 84 S. E. 1015 (1915).

§ 90-132. When examination dispensed with; temporary permit.— The Board may, upon the payment of a fee of two dollars, grant a certificate to practice osteopathy in this State without examination, if application therefor is filed within ninety days after the passage of this act, to any person having a diploma from a legally chartered school or college of osteopathy, which was in good standing at the time of issuing of such diploma as defined by the Board, and who shall meet the requirements of the Board in other respects, and who was in active

practice in this State at the time of the passage of this article.

The Board may, in its discretion, dispense with an examination in the case, first, of an osteopathic physician duly authorized to practice osteopathy in any other state or territory, or the District of Columbia, who presents a certificate of license issued after an examination by the legally constituted board of such state, territory, or District of Columbia, accorded only to applicants of equal grade with those required in this State; or, second, an osteopathic physician who has been in the actual practice of osteopathy for five years, who is a graduate of a reputable school of osteopathy, who may desire to change his residence to this State, and who makes application on a form to be prescribed by the Board, accompanied by a fee of twenty-five dollars.

The secretary of the Board may grant a temporary permit until a regular meeting of the Board, or to such time as the Board can conveniently meet, to one whom he considers eligible to practice in the State, and who may desire to commence the practice immediately. Such permit shall only be valid until legal action of the Board can be taken. In all the above provisions the fee shall be the same as charged to applicants for examination. (1907, c. 764, s. 2; C. S., s. 6703.)

- 90-133. Fees held by Board; salaries; payment of expenses.—All fees shall be paid in advance to the treasurer of the Board, to be by him held as a fund for the use of the State Board of Osteopathic Examination and Registration. The compensation and expenses of the members and officers of said Board, and all expenses proper and necessary, in the opinion of said Board, to discharge its duties under and to enforce the law, shall be paid out of such fund, upon the warrant of the president and secretary of said Board, and no expense shall be created to exceed the income of fees or fines as herein provided. The salaries shall be fixed by the Board, but shall not exceed ten dollars per day per member, and railroad and hotel expenses. (1907, c. 764, s. 3; C. S., s. 6705.)
- 90-134. Subject to State and municipal regulations.—Osteopathic physicians shall observe and be subject to all State and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and all matters pertaining to public health, the same as physicians of other schools of medicine, and such reports shall be accepted by the officers or department to whom the same are made. (1907, c. 764, s. 4; C. S., s. 6706.)
- § 90-135. Record of certificates; fees .- Every person holding a certificate from the State Board of Examination and Registration shall have it recorded in the office of the county clerk of the county in which he or she expects to Until such certificate is filed for record, the holder shall exercise none of the rights or privileges therein conferred. Said clerk of the county shall keep in a book for that purpose a complete list of all certificates recorded by him, with the date of the recording of each certificate. Each holder of a certificate shall pay to said clerk a fee of one dollar for making such record. (1907, c. 764, s. 5; C. S., s. 6707.)

- 90-136. Revocation or suspension of license.—The North Carolina State Board of Osteopathic Examination and Registration may refuse to issue a license to anyone otherwise qualified, and may suspend or revoke any license issued by it to any esteopathic physician, who is not of good moral character, and/or for any one or any combination of the following causes:
- 1. Conviction of a felony, as shown by a certified copy of the record of the court
- 2. The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value, by fraudulent misrepresentations;

3. Gross malpractice:

4. Advertising by means of knowingly false or deceptive statements;

5. Advertising, practicing, or attempting to practice under a name other than one's own:

6. Habitual drunkenness or habitual addiction to the use of morphine, cocaine,

or other habit-forming drugs.

Each of the following acts constitutes a misdemeanor, punishable upon conviction by a fine of not less than twenty-five (\$25.00) dollars nor more than two hundred (\$200.00) dollars; or imprisonment for not less than thirty days nor more than one year, or both in the discretion of the court:

1. The practice of osteopathy or an attempt to practice osteopathy, or pro-

fessing to do so without a license;

2. The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value by fraudulent misrepresentation;

3. The making of any willfully false oath or affirmation whenever an oath or affirmation is required by this article:

4. Advertising, practicing or attempting to practice osteopathy under a name

other than one's own.

The State Board may neither suspend nor revoke any license, however, for any of the causes hereinabove set forth unless the person accused has been given at least twenty days' notice in writing of the charge against him and a public

hearing had by said Board, or a quorum thereof.

At the time and place named in said notice the said Board, or a quorum thereof, shall proceed to hear the charges against the accused upon competent evidence, oral or by deposition, and at said hearing said accused shall have the right to be present in person and/or represented by counsel. After hearing all the evidence, including such evidence as the accused may present, the Board shall determine its action and announce the same.

From any action of the Board depriving the accused of his license, or certificate of renewal of license, the accused shall have the right of appeal to the superior court of the county wherein the hearing was held, upon filing notice of appeal within ten days of the decision of the Board. The record of the hearing before the North Carolina State Board of Osteopathic Examination and Registration shall constitute the record upon appeal in the superior court. (1937, c. 301,

- § 90-137. Restoration of revoked license.—Whenever any osteopath has been deprived of his license, the North Carolina State Board of Osteopathic Examination and Registration, in its discretion, may restore said license upon due notice being given and hearing had, and satisfactory evidence produced of proper reformation of the licentiate before restoration. (1937, c. 301, s. 3.)
- § 90-138. Objects of North Carolina Osteopathic Society. The object of the North Carolina Osteopathic Society shall be to unite the osteopaths of this State for mutual aid, encouragement, and improvements; to encourage scientific research in the laws of health and treatment of diseases of the human family; to elevate the standard of professional thought and conduct in the practice of osteopathy and to restrict the practice of osteopathy to persons educated and

trained in the science and possessing a diploma from a reputable college of osteopathy. (1907, c. 764, s. 7; C. S., s. 6709.)

ARTICLE 8. Chiropractic.

§ 90-139. Creation and membership of Board of Examiners.—There is hereby created and established a board to be known by the name and style of the State Board of Chiropractic Examiners. The Board shall be composed of three practicing chiropractors of integrity and ability, who shall be residents of the State, and no more than two members of said Board shall be graduates from the same school or college of chiropractic. (1917, c. 73, s. 1; C. S., s. 6710.)

the 1949 amendments to this article, see 27 N. C. Law Rev. 406.

The case of State v. Gibson, 169 N. C.

Editor's Note. - For brief comment on 381, 85 S. E. 7 (1915), decided before this article was passed, applied the rule laid down in § 90-131 to all nondrug-giving practitioners.

§ 90-140. Appointment; term; successors; recommendations.—The Governor shall appoint the members of the State Board of Chiropractic Examiners, whose terms of office shall be as follows: One member shall be appointed for a term of one year from the close of the next regular annual meeting of the North Carolina Chiropractic Association; one member shall be appointed for a term of two years from such time, and one member shall be appointed for a term of three years from such time. Annually thereafter, at the time of the annual meeting or immediately thereafter the Governor shall appoint one member of the State Board of Chiropractic Examiners, whose term of office shall be three years, and such members of the Board of Examiners shall be appointed from a number of not less than five who shall be recommended by the North Carolina Chiropractic Association. (1917, c. 73, s. 2; C. S., s. 6711; 1933, c. 442, s. 1.)

Editor's Note.—The 1933 amendment practors" to "North Carolina Chiropractic changed "North Carolina Board of Chiro-Association."

§ 90-141. Organization and vacancies. — The Board of Chiropractic Examiners shall elect such officers as they may deem necessary, and in case of a vacancy, caused by death or in any other manner, a majority of the Board shall have the right to fill the vacancy by the election of some other member of the North Carolina Chiropractic Association. (1917, c. 73, s. 4; C. S., s. 6713; 1933, c. 442, s. 1.)

Editor's Note.—The 1933 amendment practors" to "North Carolina Chiropractic changed "North Carolina Board of Chiro-Association."

- § 90-142. Rules and regulations.—The State Board of Chiropractic Examiners may adopt suitable rules and regulations for the performance of their duties. (1919, c. 148, s. 4; C. S., s. 6714.)
- § 90-143. Definitions of chiropractic; examinations; educational requirements.—Chiropractic is herein defined to be the science of adjusting the cause of disease by realigning the twenty-four moveable vertebrae of the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body. It shall be the duty of the Board of Examiners to examine all applicants who shall furnish satisfactory proof of good character and of graduation from a regular chiropractic school of good standing, and such examination shall embrace such branches of study as are usually included in the regular course of study for chiropractors in chiropractic schools or colleges of good standing, including especially an examination of each applicant in the science of chiropractic as herein defined. Every applicant for license

shall furnish to said Board of Examiners sufficient and satisfactory evidence that, prior to the beginning of his course in chiropractic, he had obtained a high school education, or what is equivalent thereto, entitling him to admission in a reputable college or university; and he shall also exhibit to said Board of Chiropractic Examiners, or satisfy them that he holds, a diploma from a reputable chiropractic college, and not a correspondence school, and that said diploma was granted to him on a personal attendance and completion of a regular four years' course in such chiropractic college, and such applicant shall be examined in the following studies: Chiropractic analysis, chiropractic philosophy, chiropractic neurology, palpation, nerve tracing, microscopy, histology, anatomy, gynecology, jurisprudence, chemistry, pathology, hygiene, physiology, embryology, eye, ear, nose, and throat, dermatology, symptomology, spinography, chiropractic orghopody, and the theory, teaching and practicing of chiropractic.

Provided further, that the said State Board of Chiropractic Examiners may license by reciprocity, upon application, any chiropractor holding a license issued to him by a regular board of chiropractic examiners in another state when said Board is satisfied that such applicant has educational qualifications, or the equivalent thereof, equal to those prescribed by said Board for admission to practice chiropractic in this State, and upon proof of good moral character and that he has practiced chiropractic under such license for at least one year. (1917, c. 73, s. 5; 1919, c. 148, ss. 1, 2, 5; C. S., s. 6715; 1933, c. 442, s. 1; 1937, c.

293, s. 1.)

Editor's Note.—The 1933 amendment changed "North Carolina Board of Chiropractors" to "North Carolina Chiropractic Association." It also raised the personal attendance course from three to four years. The 1937 amendment struck out the former last sentence and inserted the second paragraph in lieu thereof.

Discretionary Power of Board.—Chapter 73, Public Laws 1917, establishing a Board of Chiropractic Examiners, gave the Board large discretionary powers to examine and license applicants to practice this science, and to pass upon their other qualifications specified therein. The act, construed with the 1919 amendatory act, provided that those practicing chiropractic in the State

prior to 1918 could receive their licenses upon proof of good character and proper proficiency upon examination. It was also provided that those so practicing prior to 1917 should be granted a license without examination. Neither of the acts dispensed with the discretionary power of the Board to pass upon the requisites of good character, or the fact as to whether the applicants thereunder had been bona fide practitioners for the requisite time. It was held that the courts would not inquire into such matters and that a mandamus would not lie to compel the Board to issue a license under said acts. Hamlin v. Carlson, 178 N. C. 431, 101 S. E. 22 (1919).

§ 90-144. Meetings of Association and Board of Examiners.—The North Carolina Chiropractic Association shall meet at least once a year at such time and place as said Association shall determine. The North Carolina Board of Chiropractic Examiners shall meet at least once a year at such time and place as said Board shall determine at which meetings applicants for license shall be examined. (1917, c. 73, s. 6; C. S., s. 6716; 1933, c. 442, s. 1; 1949, c. 785, s. 1.)

Editor's Note.—The 1933 amendment changed "North Carolina Board of Chiropractors" to "North Carolina Chiropractic Association."

The 1949 amendment rewrote this sec-

tion. Prior to the amendment the annual meetings of the Association and the Board of Examiners were required to be held at the same time and place.

§ 90-145. Grant of license; temporary license.—The Board of Chiropractic Examiners shall grant to each applicant who is found to be competent, upon examination, a license authorizing him or her to practice chiropractic in North Carolina. Said Board may grant a temporary license to any applicant who shall comply with the requirements of this article as to proof of good character and of graduation from a chiropractic school or college as prescribed in this article;

but such temporary license shall not continue in force longer than until the next meeting of said Board, and in no case shall a temporary license be granted to an applicant who has already been refused a license by said Board. (1917, c. 73, s. 7; C. S., s. 6717; 1949, c. 785, s. 2.)

Editor's Note. — The 1949 amendment rewrote this section.

- § 90-146. Graduates from other states.—A graduate of a regular chiropractic school who comes into this State from another state may be granted a license by the Board of Examiners as required in this article. (1917, c. 73, s. 8; C. S., s. 6718.)
- § 90-147. Practice without license a misdemeanor. Any person practicing chiropractic in this State without having first obtained a license as provided in this article shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1917, c. 73, s. 9; C. S., s. 6719.)
- § 90-148. Records of Board. The secretary of the Board of Chiropractic Examiners shall keep a record of the proceedings of the Board, giving the name of each applicant for license, and the name of each applicant licensed and the date of such license. (1917, c. 73, s. 10; C. S., s. 6720.)
- § 90-149. Application fee.—Each applicant shall pay the secretary of said Board a fee of twenty-five dollars. (1917, c. 73, s. 11; C. S., s. 6721.)
- § 90-150. Exempt from jury service.—All duly licensed chiropractors of this State shall be exempt from service as jurors in any of the courts of this State. (1933, c. 442, s. 2.)
- § 90-151. Extent and limitation of license.—Any person obtaining a license from the Board of Chiropractic Examiners shall have the right to practice the science known as chiropractic, in accordance with the method, thought, and practice of chiropractors, as taught in recognized chiropractic schools and colleges, but shall not prescribe for or administer to any person any medicine or drugs, nor practice osteopathy or surgery. (1917, c. 73, s. 12; C. S., s. 6722; 1933, c. 442, s. 3.)

Editor's Note.—The 1933 amendment the words "as taught in recognized chiro-inserted, near the middle of this section, practic schools and colleges."

- § 90-152. Registration of license.—Any person desiring to engage in the practice of chiropractic, having first obtained a license as herein provided, shall appear before the clerk of the superior court of the county in which he resides, or proposes to practice, for registration as a chiropractor. He shall produce and exhibit to the said clerk a license obtained from the Board of Chiropractic Examiners, and upon such exhibition the clerk shall register the name and residence of the applicant, giving the date of such registration, in a book to be kept for the purpose of registering chiropractors, and shall issue to him a certification of such registration under the seal of the superior court of such county, for which the clerk shall be entitled to collect from said applicant a fee of fifty cents. The person obtaining such certificate shall be entitled to practice chiropractic anywhere in this State; but if he shall remove his residence to another county, he shall exhibit said certificate to the clerk of the superior court of such other county and be registered. Anyone receiving a temporary license as provided in this article shall not be entitled to register. but may practice anywhere in this State during the time such temporary license shall be in force. (1917, c. 73, s. 13; C. S., s. 6723.)
- § 90-153. Licensed chiropractors may practice in public hospitals. —A licensed chiropractor in this State may have access to and practice chiro-

practic in any hospital or sanitarium in this State that receives aid or support from the public. (1919, c. 148, s. 3; C. S., s. 6724.)

§ 90-154. Grounds for refusal or revocation of license.—The Board of Chiropractic Examiners may refuse to grant or may revoke a license to practice chiropractic in this State, upon the following grounds: Immoral conduct, bad character, the conviction of a crime involving moral turpitude, habitual intemperance in the use of ardent spirits, narcotics, or stimulants to such an extent as to incapacitate him or her for the performance of such professional duties, unethical advertising, unprofessional or dishonorable conduct unworthy of and affecting the practice of his profession. (1917, c. 73, s. 14; C. S., s. 6725; 1949, c. 785, s. 3.)

Editor's Note. — The 1949 amendment added at the end of the section the following: "unethical advertising, unprofessional

or dishonorable conduct unworthy of and affecting the practice of his profession."

§ 90-155. Annual fee for renewal of license. — All persons practicing chiropractic in this State shall, on or before the first Tuesday after the first Monday in January in each year after licenses issued to them as herein provided, pay to the secretary of the Board of Chiropractic Examiners a renewal license fee of ten (\$10.00) dollars, the payment of which, and a receipt from the secretary of the Board, shall work a renewal of the license fee for twelve months.

Any license or certificate granted by the Board under this article shall automatically be canceled if the holder thereof fails to secure a renewal within three months from the time herein provided; but any license thus canceled may, upon evidence of good moral character and proper proficiency, be restored upon the payment of fifteen (\$15.00) dollars. (1917, c. 73, s. 15; C. S., s. 6726; 1933, c. 442, s. 4; 1937, c. 293, s. 2.)

Editor's Note. — Prior to the 1937 paragraph was two dollars and the fee in amendment the fee specified in the first the second paragraph was ten dollars.

§ 90-156. Pay of Board and authorized expenditures.—The members of the Board of Chiropractic Examiners shall receive their actual expenses, including railroad fare and hotel bills, when meeting for the purpose of holding examinations, and performing any other duties placed upon them by this article, such expenses to be paid by the treasurer of the Board out of the moneys received by him as license fees, or from renewal fees. The Board shall also expend out of such fund so much as may be necessary for preparing licenses, securing seal, providing for programs for licensed doctors of chiropractic in North Carolina, and all other necessary expenses in connection with the duties of the Board. (1917, c. 73, s. 16; C. S., s. 6727; 1949, c. 785, s. 4.)

Editor's Note.—The 1949 amendment in- "providing for programs for licensed serted in the second sentence the words" doctors of chiropractic in North Carolina."

§ 90-157. Chiropractors subject to State and municipal regulations.—Chiropractors shall observe and be subject to all State and municipal regulations relating to the control of contagious and infectious diseases. (1917, c. 73, s. 17; C. S., s. 6728.)

ARTICLE 9.

Trained Nurses.

§ 90-158. Board of Examiners.—A Board of Nurse Examiners composed of five members, to consist of three registered nurses to be elected by the North Carolina State Nurses' Association, and one representative each from the North Carolina State Medical Society and the North Carolina State Hospital Association, is hereby created to be known by the title "The North Carolina Board of Nurse Examiners."

The members of the first Board elected under this article shall serve as follows: The representative of the North Carolina State Medical Society and the representative of the North Carolina State Hospital Association shall serve for a term expiring June 1, 1925, or until their successors are qualified; and the three registered nurses elected by the North Carolina State Nurses' Association shall serve for a term expiring June 1, 1926, or until their successors are qualified. Thereafter, each member of said Board shall serve a term of three years, or until his or her successor is appointed. The Board shall fill any vacancy for an unexpired term.

The Board of Nurse Examiners is hereby empowered to prescribe such regulations as it may deem proper, governing applicants for licenses, admission to examinations, the conduct of applicants during examinations, and the conduct of the examinations proper with the approval of the standardization board hereinafter created. (1917, c. 17, s. 1; C. S., s. 6729; 1925, c. 87, s. 2; 1931, c. 56.)

Editor's Note.-Prior to the 1925 amend- training schools by the State Nurses' Asment it was provided by this section that sociation, and added a provision giving the there be two physicians on the Board Board power to make rules and regula-elected by the State Medical Society. The amendment deleted a former provision for "The Board of Nurse Examiners of North the appointment of an inspector of the

Carolina" to its present title.

§ 90-159. Committee on standardization. — A joint committee on standardization, consisting of three members appointed from the North Carolina State Nurses' Association, and four members from the North Carolina State Hospital Association, whose members shall serve for a term of three years, or until their successors are elected, is hereby created. The joint committee on standardization shall advise with the Board of Nurse Examiners herein created in the adoption of regulations governing the education of nurses, and shall jointly with the North Carolina Board of Nurse Examiners have power to establish standards and provide minimum requirements for the conduct of schools of nursing of which applicants for examination for nurse's license under this chapter must be graduates before taking such examination. (1925, c. 87, s. 3; 1931, c. 56; 1933, c. 203.)

Editor's Note.—The 1931 amendment rewrote the second sentence of this section. The 1933 amendment changed the number of members appointed from the North Carolina State Hospital Association

from three to four, and inserted the provision making the exercise of power joint with the North Carolina Board of Nurse Examiners.

- 90-160. Educational director of schools of nursing. An educational director of schools of nursing shall be annually appointed by the North Carolina State Nurses' Association, who shall report annually to the Board of Nurse Examiners, and to the North Carolina State Hospital Association. Such director shall be a registered nurse, her duties and compensation to be fixed by the Board of Nurse Examiners and the standardization board. (1925, c. 87, s. 4.)
- § 90-161. Organization of Board; seal; officers; compensation.— Three members of the Board shall constitute a quorum, two of whom shall be

The Board shall adopt and have custody of a scal and shall frame bylaws and regulations for its own government and for the execution of the provisions of this article. The officers of said Board shall be a president and a secretarytreasurer, both to be elected from its nurse members. The treasurer shall give bond in such sum as may be fixed in the bylaws, and the premium therefor to be paid from the treasury of said Board. The members of the Board shall receive such compensation in addition to actual traveling and hotel expenses as shall be fixed by the Board. The secretary-treasurer may receive an additional salary to be fixed by the Board, said expenses and salaries to be paid from fees received by the Board under the provisions of this article, and in no case to be

charged upon the treasury of the State.

All moneys received in excess of said allowance, and other expenses provided for, shall be held by the secretary-treasurer for the expenses of the Board and for extending nursing education in the State. (1917, c. 17, s. 2; C. S., s. 6730; 1925, c. 87, s. 5.)

Editor's Note.-The 1925 amendment changed the compensation of members of

§ 90-162. Meetings for examination; prerequisites for applicants. -The Board of Nurse Examiners of North Carolina shall convene not less frequently than once annually, and at any time ten or more applicants shall notify the secretary-treasurer that they desire an examination. Thirty days prior to such meetings notice stating time and place of examination shall be published in one nursing journal and three daily State papers.

At such meetings it shall be the duty of the Board of Nurse Examiners to examine graduate nurses applying for license to practice their profession in North Carolina. An applicant must prove to the satisfaction of the Board that he or she is twenty-one years of age, is of good moral character, and has

graduated from high school or has equivalent credits.

Applicants shall have graduated from a school of nursing connected with a general hospital giving a three years' course of practical and theoretical instruction, which said hospital meets the minimum requirements and standards for the conduct of schools of nursing which may have been set up and established by the joint committee on standardization provided for in § 90-159. Such schools of nursing may give credit for college work on the three years' course to the extent and as may be approved by the Board of Nurse Examiners, such credits not to total more than one year for any one person. (1917, c. 17, s. 3; C. S., s. 6731; 1925, c. 87, s. 6; 1931, c. 56.)

Editor's Note. - The 1925 amendment paragraph and substituted in the second added a provision that schools of nursing should meet the requirements of the American Nurses' Association formerly appearing in the third paragraph of this section. The 1931 amendment rewrote this

paragraph the words "graduated from high school or has equivalent credits" for the words "receive at least one year of high school education or its equivalent."

§ 90-163. Scope of examination; fees; licensing.—Examinations shall be held in anatomy and physiology, materia medica, dietetics, hygiene and elementary bacteriology, obstetrical, medical and surgical nursing, nursing of children, contagious diseases and ethics of nursing, and such other subjects as may be prescribed by the examining board. The subject of contagious diseases may be given in theory only. If on examination the applicant should be found competent, the board shall grant a license authorizing him or her to register as herein provided and to use the title "registered nurse," signified by the letters "R. N."

Before an applicant shall be permitted to take such an examination he or she shall pay to the secretary of the examining board an examination fee of fifteen dollars. In the event of the failure of the applicant to pass examination, one-half of the above named fee shall be returned to the applicant. (1917, c. 17. s. 4; C. S., s. 6732; 1925, c. 87, s. 7; 1947, c. 116, s. 1.)

Editor's Note.—This section was re- creased the fee in the second paragraph enacted without change by the 1925 amendment, and the 1947 amendment infrom ten to fifteen dollars.

§ 90-164. Licenses and certificates without examination; fee.—The Board of Nurse Examiners shall have authority to issue licenses without examination to nurses registered in other states: Provided, that said states shall

maintain an equivalent standard of registration requirements. The examination

fee shall accompany each such application for license.

The Board shall also have power in the exercise of its discretion to issue a license without examination to any applicant who has been duly registered as a registered nurse under the laws of another state: Provided, said applicant possesses qualifications at least equal to those required by the State of North Carolina. The fee for license without examination shall be fifteen dollars (\$15.00). (1917, c. 17, s. 5; C. S., s. 6733; 1925, c. 87, s. 8; 1947, c. 116, s. 2.)

Editor's Note. — The 1925 amendment amendment decreased the fee therein from added the second paragraph, and the 1947 \$25.00 to \$15.00.

§ 90-165. Only licensed nurses to practice. — On and after February 28, 1925, all "trained," "graduate," "licensed," or "registered" nurses must obtain licenses from the Board of Nurse Examiners before practicing their profession in this State, and before using the abbreviation "R. N." But nothing in this section shall be construed to apply to any nurse who is qualified and practicing her profession on February 28, 1925. (1917, c. 17, s. 6; c. 288; C. S., s. 6734; 1925, c. 87, s. 9; 1947, c. 116, s. 3.)

section from having a retroactive effect. The 1947 amendment struck out the words

Editor's Note .- The 1925 amendment "must obtain certificates of registration deleted a former proviso preventing the from the clerk of the superior court of any county as hereinafter provided," formerly appearing after the abbreviation R. N.

§ 90-166. Certain persons not affected by this article.—This article shall not be construed to affect or apply to the nursing of the sick by friends or members of the family. (1917, c. 17, s. 7; C. S., s. 6735; 1925, c. 87, s. 10; 1931, c. 56.)

amendment, and the 1931 amendment re-Editor's Note. - This section was reenacted without change by the 1925 wrote the section.

- § 90-167. Temporary nursing in State. The Board of Nurse Examiners may make reasonable rules of comity allowing registered nurses from other states to do temporary nursing in this State. (1925, c. 87, s. 101/2.)
- § 90-168. Renewal of license; lapsation and reinstatement; temporary retirement from practice.—The license of every person licensed or deemed to be licensed under the provisions of this article shall be annually renewed, except as hereinafter provided. On or before November 1st, 1947. and annually thereafter, the Board shall mail to the last known address an application for renewal of license to every person who has received from the Board a license or who has a right to renewal of license because of having received a license under the provisions of chapter 87 of the Public Laws of North Carelina, 1925, as amended, or under laws existing prior thereto. The applicant shall fill in the application blank and return it to the Board with a renewal fee of one dollar (\$1.00) before January 1st, 1948 and on or before January 1st of each year thereafter. Upon receipt of the application and fee the Board shall verify the accuracy of the application and issue to the applicant a certificate of renewal for the current year beginning January 1st and expiring December 31st. Such certificate of renewal shall render the holder thereof a legal practitioner for the period stated on the certificate of renewal.

Any licensee who allows his or her license to lapse by failing to renew the license as provided above may be reinstated by the Board on satisfactory explanation for such failure to renew his or her license and on payment of a fee of five dollars (\$5.00). A lapse shall not be deemed to have accrued during a period of service in the armed services of the United States and for six months

thereafter.

Any person practicing nursing during the time his or her license has lapsed shall be considered an illegal practitioner and shall be subject to the penalties provided for violations of this article. A person licensed under the provisions of this article desiring to retire from practice temporarily, shall send a written notice to the Board. Upon receipt of such notice the Board shall place the name of such person upon the nonpracticing list. While remaining on this list the person shall not be subject to the payment of any renewal fees and shall not practice in the State. When the person desires to resume practice, application for renewal of license and payment of renewal fee for the current year shall be made to the Board. (1917, c. 17, s. 8; C. S., s. 6736; 1925, c. 87, s. 11; 1947, c. 116, s. 4.)

Editor's Note. — This section was reenacted without change by the 1925 to registration of nurses. amendment. And the 1947 amendment re-

§ 90-169. Revocation or suspension of license and procedure therefor.—The Board shall have the power to suspend or revoke the license of any registered nurse upon any one or more of the following grounds, after notice, hearing, and determination by the Board as hereinafter provided for: gross incompetency, dishonesty, intemperance, or any act derogatory to the morals or standing of the profession of nursing. The procedure for the revocation or suspension of a license shall be in accordance with the provisions of chapter 150. General Statutes of North Carolina, 1943, entitled "Uniform Revocation of Licenses." Upon the revocation or suspension of a license the name of the holder thereof shall be stricken from the roll of registered nurses in the hands of the secretary of the Board. (1917, c. 17, s. 9; C. S., s. 6737; 1925, c. 87, s. 12; 1947, c. 116, s. 5.)

Editor's Note. — This section was reenacted without change by the 1925 wrote the section.

§ 90-170. Violation of article misdemeanor.—Any person procuring license under this article by false representation, or who shall refuse to surrender a license which has been revoked in the manner prescribed in the preceding section, or who shall use the title "trained," "graduate," "licensed" or "registered nurse," or the abbreviation "R. N." without having first obtained a license, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. Each act shall constitute a new offense. (Rev., s. 3656; 1917, c. 17, s. 10; C. S., s. 6738; 1925, c. 87, s. 13.)

Editor's Note.—This section was reenacted without change by the 1925 amendment.

§ 90-171. Training school for nurses at Sanatorium.—The State sanatorium for the treatment of tuberculosis, located at Sanatorium, North Carolina, is hereby authorized and power is hereby expressly given it to organize and conduct a training school for nurses in connection with the said sanatorium. The superintendent of the North Carolina sanatorium for the treatment of tuberculosis shall be ex officio dean of the training school for nurses, and he shall have power and authority to appoint such faculty, prescribe such course or courses of lectures, study and clinical work, and award such diplomas, certificates, or other evidence of the completion of such course or courses as he may think wise and proper, and perform such other functions and do such other acts as he may think necessary in the conduct of the said training school. (1915, c. 163, ss. 1, 2; C. S., s. 6739.)

ARTICLE 9A.

Practical Nurses.

§ 90-171.1. Board of Examiners.—Solely and exclusively for the purpose of examining, licensing, and regulating practical nurses in accordance with

and under the provisions of this article and for the purpose of administering the provisions of this article as it relates to practical nurses, the North Carolina Board of Nurse Examiners is hereby enlarged by adding to the Board three members who shall be practical nurses, who shall be appointed by the Undergraduate and Practical Nurses Organization, Incorporated, and the Practical Nurses Association of Durham. These practical nurse members added to the Board for the purposes stated shall be originally appointed for terms commencing on June 1, 1947, one for a term of one year, one for a term of two years, and one for a term of three years, and until their successors shall be appointed and shall quality. Thereafter, appointments shall be for a term of three years. Following the formation of a licensed practical nurses association in North Carolina, all appointments of the practical nurse members of the Board, as enlarged, shall be made by such licensed practical nurses association.

For all other purposes, except as herein specifically provided, the membership of the North Carolina Board of Nurse Examiners shall be and remain constituted as provided by General Statutes, chapter 90, article 9, and except as herein specifically provided, the powers, duties, and functions of the Board as constituted by chapter 90, article 9, of the General Statutes, shall not be affected

by the provisions of this article.

The practical nurse members of the Board, as enlarged by this article, shall participate only in such action and functions of the Board as shall concern and affect matters relating to the examination, licensing and the regulation of undergraduate and practical nurses and relating to the administration of the provisions of this article. No business shall be transacted or other action taken concerning undergraduate and practical nurses at any meeting of the Board, as enlarged by this article, unless at least two of the practical nurse members shall be present.

The officers of the Board, as enlarged by this article, shall be the officers of the North Carolina Board of Nurse Examiners, who shall continue to be regis-

tered professional nurses.

The secretary-treasurer of the Board shall keep and maintain separate records and accounts of the funds arising from fees received under the provisions of General Statutes, chapter 90, article 9, as amended, from registered professional nurses and applicants for licensure as registered professional nurses, and of the funds arising from fees received under the provisions of this article from licensed practical nurses and applicants for licensure as licensed practical nurses.

The practical nurse members of the Board, as enlarged by this article, shall receive a per diem for attendance at meetings of the Board not exceeding ten dollars (\$10.00) per day, and in addition thereto they shall be entitled to their actual traveling and hotel expenses, to be approved by the enlarged Board, which shall be paid from the practical nurse funds arising from fees authorized by this

article

The Board, as enlarged by this article, is hereby empowered to authorize and direct the use of the funds arising from fees received under the provisions of this article from licensed practical nurses and applicants for licensure as licensed practical nurses for the purpose of contributing towards the payment of joint office expenses and joint operating expenses, including salaries of the secretary-treasurer and other employees who serve both the North Carolina Board of Nurse Examiners and the Board, as enlarged by this article, and including the salary of the educational director, in the event the same individual is serving and performs the duties of educational director with respect to both the schools and training of professional nurses and the schools and training of practical nurses; provided, however, that the amount of funds arising from fees received under the authority and provisions of this article which may be so authorized and used for such joint purposes shall not exceed one-half of the total annual amount of such joint salaries and expenses during any fiscal year.

The Board, as enlarged by this article, is authorized and empowered to ap-

point and employ an educational director, together with such assistants as the Board may deem necessary, for the purpose of performing such duties and functions as may be prescribed by the joint committee on standardization, as enlarged by this article, in carrying out the provisions of this article. Such educational director may be the same individual acting and serving as educational director as provided for by the General Statutes, § 90-160, in which event the salary and expenses of such educational director shall be fixed in accordance with the provisions of General Statutes, § 90-160. In the event an additional educational director shall be named by the Board, as enlarged by this article, the Board is authorized to fix and to pay the salary of such director and assistants out of funds arising from fees authorized by this article received from licensed practical nurses and applicants for licensure as licensed practical nurses.

All moneys received from fees authorized by this article from licensed practical nurses and from applicants for licensure as licensed practical nurses, in excess of the expenditures authorized and directed by the Board to be used for salaries and expenses as hereinbefore provided for, shall be held by the secretary-treasurer for future expenses and for extending practical nursing education in North Carolina. No moneys used in carrying out this article shall be paid out of

the State treasury.

The Board, as enlarged by this article, shall provide for the examination, licensing, and regulation of licensed practical nurses, and shall provide for the licensing of those now practicing as undergraduate and practical nurses, or attendants, in the manner hereinafter provided. (1947, c. 1091, s. 1.)

- § 90-171.2. Committee on standardization.—Solely and exclusively for the purpose of carrying out the educational and standardization provisions of this article, there are added to the joint committee on standardization, as provided for by the General Statutes, § 90-159, three practical nurse members, who shall be originally appointed by the Undergraduate and Practical Nurses Organization, Incorporated, and the Practical Nurses Association of Durham. who shall serve for a period of three years from the date of appointment or until their successors are appointed and qualified. After the formation of a licensed practical nurses association, future appointments shall be made by such association. The practical nurse members shall participate only in those meetings or activities of the standardization committee as concern or pertain to practical nursing. This joint committee on standardization, as enlarged by this article, shall have the power to establish standards and provide minimum requirements for the conducting of schools of practical nursing, of which applicants for examination for the practical nurses' license under this article must be graduates before taking such examination. Nothing in this article shall be construed to limit or otherwise affect the constitution, powers, duties, and functions of the joint committee on standardization created by General Statutes, § 90-159, as provided for by chapter 90, article 9, of the General Statutes. (1947, c. 1091, s. 1.)
- § 90-171.3. Applicants; qualifications; procedure. Any applicant who desires to obtain a license to practice as a licensed practical nurse shall submit to the Board, on forms furnished by the Board, satisfactory written evidence under oath that the applicant is at least eighteen years of age, is a citizen of the United States, or has legally declared intention of becoming a citizen, is of good moral character, is in good physical and mental health, has completed an education through the first year high school, or its equivalent, and has successfully completed a course of training for practical nursing approved and accredited by the standardization committee. The application shall be accompanied by a fee of ten dollars (\$10.00) for examination and certification. (1947, c. 1091, s. 1.)
 - § 90-171.4. Examination; procedure.—An examination for licenses to

practice practical nursing shall be given by the Board at least once in each year, after notice of the time and place of holding the examination has been published at least once a week for four weeks immediately preceding such examination in such newspapers, having State-wide circulation as may be selected by the Board. The examination shall be of such character as to determine the fitness of the applicant to practice practical nursing of the sick. In the discretion of the Board written examinations may be supplemented by oral or practical examinations. If the result of the examination of any applicant shall be satisfactory to a majority of the Board, the secretary shall, upon an order of the Board, issue the applicant a certificate to that effect; whereupon the person named in the certificate shall be declared duly licensed to practice practical nursing in North Carolina. (1947, c. 1091, s. 1.)

§ 90-171.5. License without examination.—Persons twenty years of age or over now practicing as undergraduate nurses, practical nurses, or performing similar services under any other title may make application to the Board for licensure as a licensed practical nurse under this provision on or before July 1st, 1949. The above application shall be made on forms furnished by the Board, in the manner prescribed by the Board and verified by oath. The Board, without requiring an examination, shall issue a license to practice as a licensed practical nurse to any person found to be a citizen of the United States and a resident of North Carolina, twenty years of age or more, of good moral character, in good physical and mental health, and to have lived in and cared for the sick as a vocation in this State for two years immediately preceding the date of such application.

Before such license is issued such applicant must be favorably endorsed by two physicians licensed to practice in North Carolina who have personal knowledge of the applicant's qualifications as a practical nurse, must be endorsed by two persons who have employed the applicant in the capacity of a practical nurse.

The fee for each such license shall be seven dollars and fifty cents (\$7.50)

and shall accompany each application filed under this section.

The Board upon written application and such references and proof of identity as it may by rule prescribe may issue a license to practice as a licensed practical nurse without examination to any applicant who has been duly licensed or registered as a practical nurse, licensed or trained attendant, or as a person entitled to perform similar services under any other title under the laws of any other state, if in the opinion of the Board the applicant meets the preliminary requirements for licensed practical nurses under the provisions of this article upon application in the prescribed manner accompanied by a fee of ten dollars (\$10.00). (1947, c. 1091, s. 1.)

- § 90-171.6. Licensed practical nurses formally recognized.—A person holding a license to practice as a licensed practical nurse in this State shall have the right to hold and use the title "licensed practical nurse" and the abbreviation "L. P. N." No other person shall assume such title or abbreviation, or any other word, symbols or letters to indicate that the person is a licensed or registered practical nurse unless licensed as such under the provisions of this article. (1947, c. 1091, s. 1.)
- § 90-171.7. Renewal of licenses annually; procedure and fees.— The license of every person practicing under the provisions of this article shall be renewed annually upon application to the Board. On or before November one of each year, the secretary of the Board shall mail to the last known address an application for renewal of license to every licensed practical nurse in the State, but the failure to receive such application shall not excuse any practitioner from the requirements for renewal herein contained. The person receiving such application shall furnish the information indicated thereon and return the form

to the Board with a renewal fee of one dollar (\$1.00) prior to January one of the following year. Upon receipt of the application duly filled in and signed and the required fee, the secretary of the Board shall verify the accuracy of the application and issue to the applicant a certificate of renewal for the period beginning January one and ending December thirty-one of the following year. Such certificate of renewal shall constitute the holder thereof a duly licensed practical nurse for the period indicated on such certificate. Failure to renew the license thus annually shall automatically result in forfeiture of the right to practice nursing in North Carolina as a licensed practical nurse until application shall have been made and the fee therefor paid for the current year. (1947, c. 1091, s. 1.)

§ 90-171.8. Revocation and suspension of licenses; procedure for reinstatement.—The Board, as enlarged by this article, shall have power to deny, revoke or suspend any license to practice as a licensed practical nurse applied for or issued by the Board in accordance with the provisions of this article for gross incompetency, negligence while on duty, the commission of a felony or a crime involving moral turpitude, habitual drunkenness, addiction to the use of drugs, or for any habit rendering her unfit to care for the sick, or for violation of any provision of this article. The procedure for revocation or suspension of a license shall be in accordance with the provisions of chapter 150, General Statutes of North Carolina, 1943, entitled, "Uniform Revocation of Licenses." Upon revocation or suspension of a license the name of the holder thereof shall be stricken from the roll of licensed practical nurses in the hands of the secretary of the Board.

When the license of any person has been revoked as herein provided, the Board may, after the expiration of three months, and upon payment of a fee of five dollars (\$5.00), entertain an application for and grant a new license without further examination. No such new license shall be granted except upon the affirmative vote of at least five members of the Board. (1947, c. 1091, s. 1.)

§ 90-171.9. Accredited institutions and courses for training practical nurses; powers of standardization committee .- Any institution desiring to conduct a course for the training of licensed practical nurses shall apply to the standardization committee, and submit evidence that it is prepared to give a course of not less than twelve months of theoretical instruction and practical training and experience in practical nursing prescribed in a curriculum adopted by the standardization committee and specified by law and that it is prepared to meet other standards and regulations adopted by the standardization committee. Such instruction and experience may be secured in one or more institutions approved for the purpose by the standardization committee. The length of such course shall not be less than twelve months. Upon receipt of such application, a survey of the institution or institutions with which the course is to be affiliated shall be made by an educational director designated by the enlarged Board, and a written report of such survey shall be submitted to the standardization committee. If in the opinion of the standardization committee the requirements for accredited courses for licensed practical nurses are met, the standardization committee shall declare the course to be an accredited course for licensed practical

The standardization committee shall, annually or more often, as it may deem necessary, survey all courses for the training of licensed practical nurses in the State. Written reports of such surveys shall be submitted to the standardization committee. If the standardization committee determines that any accredited course for the training of practical nurses is not attaining the standard required by the statutes and the standardization committee, notice thereof in writing specifying the deficiencies shall be given immediately to the institution giving such course. If the deficiencies are not corrected to the satisfaction of the standardization committee within a reasonable time, the course of training shall be

removed from the list of courses accredited for training licensed practical nurses. (1947, c. 1091, s. 1.)

- § 90-171.10. Article does not prohibit other persons from performing nursing service.—No provision of this article shall be construed to prohibit the performance of general nursing service by any person for compensation or gratuitously, or to prohibit the gratuitous nursing of the sick, the furnishing of services, by domestic servants, friends or relatives, or any midwife or other person who does not assume to be or hold herself out to be a licensed practical nurse. (1947, c. 1091, s. 1.)
- § 90-171.11. Violation of article; penalties.—After the effective date of this article it shall be unlawful for any person to:
- a. Represent herself to be a licensed practical nurse or use the designation "licensed practical nurse" or the abbreviation "L. P. N.," unless she is licensed under the provisions of this article.

b. Make a material false statement or representation to the Board in applying for a license under this article.

c. Refuse to surrender a license which has been revoked in the manner prescribed herein.

d. Represent that any school or course is approved or accredited as a course or school for the training of licensed practical nurses unless such course or school has been approved and accredited by the standardization committee hereinabove referred to.

Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty (30) days. (1947, c. 1091, s. 1.)

§ 90-171.12. Undergraduate nurse. — The words "practical nurse" or "licensed practical nurse," shall mean and include "undergraduate nurse." (1947, c. 1091, s. 2.)

ARTICLE 10.

Midwives.

- § 90-172. Midwives to register.—All persons, other than regularly registered physicians, practicing midwifery in this State shall register, without fee, their names and addresses with the secretary of North Carolina State Board of Health, as required by the provisions of article 17, entitled Inflammation of Eyes of Newborn, of the chapter Public Health. (1917, c. 257, ss. 8, 9; C. S., s. 6750.)
- § 90-173. Persons forbidden to practice midwifery.—It shall be unlawful for any person who habitually gets drunk, or who is addicted to the excessive use of cocaine or morphine or other opium derivative, to practice midwifery for a fee. (1911, c. 34, s. 1; C. S., s. 6751.)
- § 90-174. Disinfection of hands of practitioners.—It shall be unlawful for any midwife or other person who practices midwifery for fees to touch or otherwise handle the private parts of the person of any patient upon whom such person is in attendance unless the person so in attendance shall first and immediately previous thereto thoroughly wash and disinfect his or her hands. (1911, c. 34, s. 2; C. S., s. 6752.)
- § 90-175. Violation of two preceding sections misdemeanor.—Any person violating §§ 90-173 and 90-174 shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five nor more than ten dollars. (1911, c. 34, s. 4; C. S., s. 6753.)

- § 90-176. Practice of midwifery regulated by State Board of Health.—The State Board of Health is hereby authorized, empowered and directed to adopt, promulgate and enforce rules and regulations governing the practice of midwifery in this State. (1935, c. 225, s. 1.)
- § 90-177. Permit from State Board of Health.—No person shall practice midwifery in this State, except upon a permit granted and issued by the State Board of Health, under rules and regulations which it shall adopt with respect thereto, and upon forms which it shall prescribe. Provided that all persons who have practiced midwifery in this State for a period of five (5) years or more shall as a matter of right be entitled to the issuance of a permit to practice such occupation, if such person or persons shall make application therefor on or before April 24, 1936. (1935, c. 225, s. 2.)
- § 90-178. Practicing without permit a misdemeanor; authority of local health officers unaffected; counties may exempt themselves from law.—Any person who shall practice midwifery in this State without such permit from the State Board of Health, or who, in such practice, shall violate any of the rules and regulations adopted and promulgated by the State Board of Health, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than fifty (\$50.00) dollars, or imprisonment of not more than thirty (30) days; provided, the provisions of §§ 90-176 to 90-178 shall not apply to licensed medical or osteopathic physicians. Provided nothing herein shall be construed to interfere with or supplant the authority of the local health officers over the practice of midwifery in those counties and/or cities having organized health departments now controlling and regulating the practice of midwifery. Provided that any county in the State not desiring to remain under the provisions of §§ 90-176 to 90-178 may withdraw from same by resolution duly passed by the board of commissioners of said county and certified to State Board of Health. (1935, c. 225, s. 3.)

ARTICLE 11.

Veterinaries.

- § 90-179. State Veterinary Medical Association incorporated.—The association of veterinary surgeons and physicians calling themselves the North Carolina State Veterinary Medical Association is declared to be a body politic and corporate under the name and style of The North Carolina State Veterinary Medical Association. (1903, c. 503; Rev., s. 5431; C. S., s. 6754.)
- § 90-180. Board of Veterinary Medical Examiners; appointment; membership; organization. In order to properly regulate the practice of veterinary medicine and surgery there shall be a board to be known as the North Carolina Board of Veterinary Medical Examiners, to consist of five members of the North Carolina Veterinary Medical Association. The Governor shall annually appoint one member of such Board, who shall hold his office for five years, and until his successor is appointed and qualified. Every person so appointed shall, within thirty days after notice of appointment, appear before the clerk of the superior court of the county in which he resides and take oath to faithfully discharge the duties of his office. (1903, c. 503, s. 2; Rev., s. 5432; C. S., s. 6755.)
- § 90-181. Meeting of Board; powers.—The Board of Examiners shall meet at least once a year at such times and places as the Association may decide upon, and remain in session sufficiently long to examine all who may make application at the appointed time for a license. Three members of said Board shall constitute a quorum. The Board of Examiners shall elect a president and a

secretary, who shall also perform the duties of a treasurer. They shall keep a regular record of their proceedings in a book to be kept for that purpose, which shall always be open for inspection, and shall keep a record of all applicants for a certificate and of all who are granted a certificate, and shall publish the names of the successful applicants at least once each year in two newspapers published in the State. The Board shall have authority to adopt such bylaws and regulations as may be necessary. (1903, c. 503, ss. 3, 4, 6, 7; Rev., s. 5433; C. S., s. 6756.)

- § 90-182. Compensation of Board.—The members of such Board shall receive such compensation for their services, not to exceed four dollars per day, and their traveling expenses, as the Association may decide upon, to be paid by the secretary of the Board out of any money coming into his hands as secretary. None of the expenses of the Board or of the members shall be paid by the State. (1903, c. 503, s. 9; Rev., s. 5434; C. S., s. 6757.)
- § 90-183. Examination and licensing of veterinaries.—The Board of Examiners shall, at their annual meeting, examine all applicants who desire license to practice veterinary medicine or surgery. If upon such examination the applicant be found to possess sufficient skill to practice veterinary medicine or surgery, and good moral character, a license or certificate shall be issued to him. No certificate shall be granted except with a concurrence of a majority of the members present. To prevent delay and inconvenience two members of the Board of Examiners may grant a temporary certificate to practice veterinary medicine or surgery, which shall be in force only until the next regular meeting of the Board of Examiners, but in no case shall such temporary certificate before the Board. The Board shall have power to require each applicant to pay a fee of not more than ten dollars before issuing a certificate and five dollars before issuing a temporary certificate. (1903, c. 503, ss. 3, 5, 8; Rev., s. 5435; C. S., s. 6758.)
- § 90-184. Rescission of license.—The Board shall have power to rescind any certificate that may have been granted by it or annul any registration made under this article in accordance with the provisions of §§ 150-1 to 150-8 upon satisfactory proof that the person thus licensed has been guilty of grossly immoral conduct or malpractice as determined by the Board. And it shall be the duty of said Board to furnish any information pertaining to the practice of veterinary medicine or surgery upon application for same by anyone practicing under this article. (1903, c. 503, s. 10; Rev., s. 5436; C. S., s. 6759.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 90-185. Practitioners before one thousand nine hundred and thirty-five.—All persons who had, on the first day of January, one thousand nine hundred and thirty-five, been practicing veterinary medicine or surgery and who have for a period of twenty years paid all fees as are required by law shall be allowed to practice veterinary medicine or surgery in this State: Provided, they make affidavit to the effect that they have practiced veterinary medicine or surgery as a profession for a period of twenty years prior to the first day of January, one thousand nine hundred and thirty-five, and that they have for a period of twenty years prior to the first day of January, one thousand nine hundred and thirty-five, paid all fees as may have been required by law. (1903, c. 503, s. 11; 1905, c. 320; Rev., s. 5437; 1913, c. 129; 1919, c. 94; C. S., s. 6760; 1921, c. 171; Ex. Sess. 1921, c. 68; 1924, c. 38; 1935, c. 387.)

Editor's Note.—The 1935 amendment rewrote this section.

§ 90-186. When may practice without license. — Nothing in this

article shall be construed to prohibit any member of the medical profession from prescribing for domestic animals in cases of emergency and collecting a fee therefor, nor to prohibit gratuitous services by any person in an emergency, nor to prevent any person from practicing veterinary medicine or surgery on any animal belonging to himself, or to prevent anyone from castrating or spaying any of the domestic animals. And this article shall not apply to commissioned veterinary surgeons in the United States army. (1903, c. 503, s. 12; Rev., s. 5438; C. S., s. 6761.)

§ 90-187. Violation of article misdemeanor.—Any person practicing veterinary surgery or medicine in this State, without first having complied with the provisions of this article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned not less than thirty days, in the discretion of the court. (1913, c. 129, s. 2; C. S., s. 6762.)

ARTICLE 12.

Chiropodists.

§ 90-188. Chiropody defined.—Chiropody (podiatry) as defined by this article is the surgical or medical or mechanical treatment of all ailments of the human foot, except the correction of deformities requiring the use of the knife, amputation of the foot or toes, or the use of an anesthetic other than local. (1919, c. 78, s. 2; C. S., s. 6763; 1945, c. 126.)

Editor's Note.—The 1945 amendment inserted "or" before "medical" and after "medical" substituted "or" for "and."

- § 90-189. Unlawful to practice unless registered.—On and after the first of July, one thousand nine hundred and nineteen, it shall be unlawful for any person to practice or attempt to practice chiropody (podiatry) in this State or to hold himself out as a chiropodist (podiatrist) or to designate himself or describe his occupation by the use of any words or letters calculated to lead others to believe that he is a chiropodist (podiatrist) unless he is duly registered as provided in this article. (1919, c. 78, s. 1; C. S., s. 6764.)
- § 90-190. Board of Chiropody Examiners; how appointed; terms of office. There shall be established a Board of Chiropody (podiatry) Examiners for the State of North Carolina. This Board shall consist of three members who shall be appointed by the North Carolina Pedic Association. All of such members shall be chiropodists who have practiced chiropody in North Carolina for a period of not less than one year. The members of the Board shall be appointed by said Association for a term of three years: Provided, the members of the first Board shall be appointed to hold office for one, two and three years respectively, and one member shall be appointed annually thereafter by said Association. The Board shall have authority to elect its own presiding and other officers. (1919, c. 78, s. 3; C. S., s. 6765.)
- § 90-191. Applicants to be examined; examination fee; requirements.—Any person not heretofore authorized to practice chiropody (podiatry) in this State shall file with the Board of Chiropody Examiners an application for examination accompanied by a fee of twenty-five dollars, together with proof that the applicant is more than twenty-one years of age, is of good moral character, and has obtained a preliminary education equivalent to four years' instruction in a high school. Such applicant before presenting himself for examination, must be a graduate of a legally incorporated school of chiropody (podiatry) acceptable to the Board. (1919, c. 78, s. 9; C. S., s. 6766.)
- § 90-192. Examinations; subjects; certificates. The Board of Chiropody Examiners shall hold at least one examination annually for the purpose

of examining applicants under this article. The examination shall be held at such time and place as the Board may see fit, and notice of the same shall be published in one or more newspapers in the State. The Board may make such rules and regulations as it may deem necessary to conduct its examinations and meetings. It shall provide such books, blanks and forms as may be necessary to conduct such examinations, and shall preserve and keep a complete record of all its transactions. Examinations for registration under this article shall be in the English language and shall be written, oral, or clinical, or a combination of written, oral, or clinical, as the Board may determine, and shall be in the following subjects wholly or in part: Anatomy, physiology, pathology, bacteriology, chemistry, diagnosis and treatment, therapeutics, clinical chiropody and asepsis; limited in their scope to the treatment of the foot. No applicant shall be granted a certificate unless he obtains a general average of seventy-five or over, and not less than fifty per cent in any one subject. After such examination the Board shall, without unnecessary delay, act on same and issue certificates to the successful candidates, signed by each member of the Board; and the Board of Chiropody Examiners shall report annually to the North Carolina Pedic Association. (1919, c. 78, s. 4; C. S., s. 6767.)

- § 90-193. Re-examination of unsuccessful applicants.—An applicant failing to pass his examination shall within one year be entitled to re-examination upon the payment of two dollars, but not more than two re-examinations shall be allowed any one applicant. Should he fail to pass his third examination he shall file a new application before he can again be examined. (1919, c. 78, s. 6; C. S., s. 6768.)
- § 90-194. Practitioners before enactment of this article; certificates.—Every person who is engaged in the practice of chiropody (podiatry) in this State one year next prior to the enactment of this article shall file with the Board of Chiropody Examiners on or before the first day of July, one thousand nine hundred and nineteen, a written application for a certificate to practice chiropody (podiatry), together with proof satisfactory to the Board that the applicant is more than twenty-one years of age and has been practicing chiropody in this State for a period of more than one year next prior to the passage of this article, and upon the payment of a fee of ten dollars the said Board of Chiropody Examiners shall issue to such applicant a certificate to practice chiropody (podiatry) in this State. (1919, c. 78, s. 5; C. S., s. 6769.)
- § 90-195. Certificates to registered chiropodists of other states.—Applicants registered or certified by examiners of other states whose requirements are equal to those of this State may, upon the payment of a fee of twenty-five dollars, be granted a certificate without examination: Provided, that the provisions of this section shall be extended only to those states which extend to this State the same privilege. (1919, c. 78, s. 8; C. S., s. 6770.)
- § 90-196. Certificates filed with clerk of court; clerk to keep record.—Every person receiving a certificate from the Board shall file the same with the clerk of the court of the city or county in which he resides. It shall be the duty of the clerk to register the name and address and date of the certificate in a book kept for such purpose as a part of the records of his office, and the number of the book and the page therein containing said recorded copy shall appear on the face of the certificate over the name of the clerk recording the same. The person thus registering shall pay to the clerk a fee of fifty cents. (1919, c. 78, s. 7; C. S., s. 6771.)
- § 90-197. Revocation of certificate; grounds for; suspension of certificate.—The Board of Chiropody Examiners may revoke by a majority vote of its members, and in accordance with the provisions of §§ 150-1 to 150-8, any certificate it has issued, and cause the name of the holder to be stricken from

the book of the registration by the clerk of the court in the city or county in which the name of the person whose certificate is revoked is registered, for any of the following causes:

1. The willful betrayal of a professional secret.

2. Any person who in any affidavit required of the applicant for certificate, registration, or examination under this article shall make a false statement.

3. Any person convicted of a crime involving moral turpitude.

4. Any person habitually indulging in the use of narcotics, ardent spirits, stimulants or any other substance which impairs intellect and judgment to such an extent as in the opinion of the Board to incapacitate such person for the performance of his professional duties.

Any person against whom charges have been made shall be notified of the fact and a copy of the charges shall be sent him by the Board, and he shall be given a fair and impartial trial by the Board, whose decisions shall be made by a majority vote of its members.

The Board may suspend any certificate granted under this article for a period not exceeding six months on account of any misconduct on the part of the person registered which would not, in the judgment of the Board, justify the revocation of his certificate. (1919, c. 78, ss. 12, 13; C. S., s. 6772.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

- § 90-198. Fees for certificates and examinations; compensation of Board.—To provide a fund in order to carry out the provisions of this article the Board shall charge ten dollars for each certificate issued and fifteen dollars for each examination. From such funds all expenses and salaries, not exceeding four dollars per diem for each day actually spent in the performance of the duties of the office and actual railroad expenses in addition, shall be paid by the Board: Provided, that at no time shall the expenses exceed the cash balance on hand. (1919, c. 78, s. 14; C. S., s. 6773.)
- § 90-199. Annual fee of \$10 required; cancellation or renewal of license.—On or before the first day of July of each year every chiropodist engaged in the practice of chiropody in this State shall transmit to the secretarytreasurer of the said North Carolina State Board of Chiropody Examiners his signature and post-office address, the date and year of his or her certificate, together with a fee to be set by the Board of Chiropody Examiners not to exceed ten (\$10.00) dollars, and receive therefor a renewal certificate. Any license or certificate granted by said Board under or by virtue of this or the following section, shall automatically be cancelled and annulled if the holder thereof fails to secure the renewal herein provided for within a period of thirty days after the thirty-first day of July of each year, and such delinquent chiropodist shall pay a penalty of five dollars for reinstatement: Provided that any legally registered chiropodist in this State who has retired from practice or who has been absent from the State may, upon furnishing affidavit to that effect, reinstate himself by paying all fees due for the years in which he was absent or retired, the said amount in no case to exceed fees for five years. (1931, c. 191.)
- § 90-200. Issuance of license upon payment of fees.—Upon payment of the fees prescribed in the above section, by or before July first, nineteen hundred and thirty-one, by any person who has heretofore practiced chiropody in the State of North Carolina, for a period of five successive years regularly, it shall be the duty of the State Board of Chiropody Examiners to issue to said person a license which shall grant to such person all the rights and privileges of chiropodists now engaged in practicing chiropody. (1931, c. 191.)
- § 90-201. Unlawful practice of chiropody a misdemeanor.—Any person who shall practice or attempt to practice chiropody (podiatry) in this State

without having complied with the provisions of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than two hundred dollars, or shall be imprisoned for not less than thirty nor more than ninety days. Nothing in this article shall be construed to interfere with physicians in the discharge of their professional duties. (1919, c. 78, s. 10; C. S., s. 6774.)

§ 90-202. Sheriffs and police to report violators of this article.— It shall be the duty of the police department of the cities and the sheriff of each county in the State to see that all practitioners of chiropody (podiatry) in the State are legally registered according to the provisions of this article, and to report to the State's attorney of the city or county all cases of violation of this article; whereupon the State's attorney shall promptly prosecute those violating the provisions of this article. (1919, c. 78, s. 11; C. S., s. 6775.)

ARTICLE 13.

Embalmers and Funeral Directors.

90-203. State Board; election; qualifications; term; vacancies.— The State Board of Embalmers and Funeral Directors shall consist of seven members, elected by the North Carolina Funeral Directors and Burial Association, Incorporated, at least five of whom shall be licensed and practicing embalmers, having experience in the care and disposition of dead human bodies. Of the five members of the Board required to be licensed and practicing embalmers, one such member of the Board shall be elected in June, one thousand nine hundred and five, and one annually thereafter in the month of June. The term of office shall begin on the first day of July, next after the election and continue for five years. The two members of the Board not required to be licensed and practical embalmers shall be elected during the month of June, one thousand nine hundred and fortynine, one for a term of two years, beginning on the first day of July, one thousand nine hundred and forty-nine, and one for a term of three years, beginning July 1, one thousand nine hundred and forty-nine; the successor of these members of the Board shall be elected thereafter during the month of June in the year in which the term of the Board member expires. The North Carolina Funeral Directors and Burial Association, Incorporated, shall fill all vacancies in such Board. (1901, c. 338, ss. 1, 2, 3; Rev., s. 4384; C. S., s. 6777; 1931, c. 174; 1945, c. 98, s. 1; 1949, c. 951, s. 1.)

Editor's Note.—The 1945 amendment substituted the words "North Carolina Funeral Directors and Burial Association. Incorporated" for the words "State Board of Health." The 1949 amendment rewrote

this section and increased the number of Board members from five to seven.

For a brief comment on the 1949 amendments to this article, see 27 N. C. Law Rev.

§ 90-204. Members; removal; oath.—The North Carolina Funeral Directors and Burial Association, Incorporated, shall have power to remove from office any member of said Board for neglect of duty, incompetency, or improper conduct. The North Carolina Funeral Directors and Burial Association, Incorporated, shall furnish each person appointed to serve on the State Board of Embalmers and Funeral Directors a certificate of appointment. The appointees shall qualify by taking and subscribing to the usual oath of office before some person authorized to administer oaths, within ten days after said appointment has been made, which oath shall be filed with the Board of Embalmers and Funeral Directors. (1901, c. 338, ss. 3, 4; Rev., s. 4385; C. S., s. 6778; 1945, c. 98, s. 2; 1949, c. 951, s. 2.)

Editor's Note.—The 1945 amendment of Health." The 1949 amendment inserted substituted the words "North Carolina the words "and funeral directors" after the Funeral Directors and Burial Association, Incorporated" for the words "State Board

word "embalmers."

- § 90-205. Common seal; powers.—The Board shall adopt a common seal, and shall have all the powers and privileges conferred on it by the laws of the State. (1901, c. 338, s. 6; Rev., s. 4386; C. S., s. 6779.)
- § 90-206. Meetings; quorum; bylaws; officers; president to administer oaths.—The Board shall meet at least once every year, during the month of July, at such place as it may determine. Four members shall constitute a quorum. At each annual meeting the Board from its members shall select a president and a secretary, who shall hold their offices for one year, and until their successors are elected. The Board shall, from time to time, adopt rules, regulations, and bylaws not inconsistent with the laws of this State or of the United States, whereby the performance of the duties of such Board and the practice of embalming of dead human bodies and conducting funerals shall be regulated. Provided, however, that any regulations concerning funerals, shall pertain to sanitation only. The Board shall also enforce such rules and regulations relative to sanitation, health and the protection of the public from contagious and infectious diseases as are promulgated by the State Board of Health with respect to the handling of dead human bodies. The president of the Board (and in his absence a president pro tempore elected by the members present) is authorized to administer oaths to witnesses testifying before the Board. (1901, c. 338, ss. 5, 6, 7, 8; Rev., s. 4387; C. S., s. 6780; 1949, c. 951, s. 3.)

Editor's Note.—The 1949 amendment rewrote this section.

§ 90-207. Grant and renewal of licenses; fees; licenses displayed.— Every person not licensed as an embalmer, now engaged or desiring to engage in the practice of embalming dead human bodies, shall make written application to the State Board of Embalmers and Funeral Directors for a license, accompanying the same with a license fee of ten dollars (\$10.00), whereupon the applicant shall present himself before the Board at a time and place to be fixed by the Board, and if the Board shall find upon due examination, that the applicant is of good moral character, possessed of skill and knowledge of said science of embalming and the care and disposition of the dead, and has a responsible knowledge of sanitation and the disinfection of bodies of deceased persons and the apartment, clothing, and bedding, in case of death from infectious or contagious disease, and has had a special course in embalming in an approved school, or two years practical experience with a licensed and practicing embalmer, who shall make affidavit upon the application that said applicant has had such experience under him, the Board shall issue to such applicant a license to practice the art of embalming and the care and disposition of the dead, and shall register such applicant as a duly licensed embalmer. Such license shall be signed by a majority of the Board and attested by its seal. All persons receiving a license under the provisions of this article shall also register the fact at the office of the board of health of the city, and where there is no board of health, with the clerk of the superior court in the county or counties in which it is proposed to carry on said practice, and shall display said license in a conspicuous place in the office of such licentiate. Every registered embalmer and funeral director who desires to continue the practice of his profession shall annually, during the time he shall continue in such practice, on such day as the Board may determine, pay to the secretary of the Board a fee of ten dollars (\$10.00) for the renewal registration. (1901, c. 338, ss. 9, 10; Rev., s. 4388; 1917, c. 36; 1919, c. 88; C. S., s. 6781; 1949, c. 951, s. 4.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—The 1949 amendment rewrote this section. It increased the amount of the fees and made other changes.

§ 90-208. Embalming without license.—If any person shall practice or hold himself out as practicing the art of embalming, without having complied with the provisions of this article, he shall be guilty of a misdemeanor, and upon con-

viction thereof shall be fined not less than fifty nor more than one hundred dollars for each offense. (1901, c. 338, s. 14; Rev., s. 3644; C. S., s. 6782.)

- § 90-209. Expenses and salaries of Board.—All expenses, salary, and per diem to members of this Board shall be paid from fees received under the provisions of this article, and shall in no manner be an expense to the State. All moneys received in excess of said per diem allowance and other expenses provided for shall be held by the secretary of said Board as a special fund for meeting the expenses of said Board. (1901, c. 338, s. 11; Rev., s. 4389; C. S., s. 6783.)
- § 90-210. Embalming schools have privileges of medical schools as to cadavers.—Schools for teaching embalming shall have extended to them the same privileges as to the use of bodies for dissection while teaching as those granted to medical colleges. (1901, c. 338, s. 15; Rev., s. 4390; C. S., s. 6784.)

ARTICLE 14.

Cadavers for Medical Schools.

§ 90-211. Board for distribution.—The North Carolina Board of Anatomy shall consist of three members, one each from the University of North Carolina School of Medicine, the Duke University School of Medicine, and the Bowman Gray School of Medicine of Wake Forest College, appointed by the deans of the respective medical schools. This Board shall be charged with the distribution of dead human bodies for the purpose of promoting the study of anatomy in this State, and shall have power to make proper rules for its government and the discharge of its functions under this article. (1903, c. 666, s. 1; Rev., s. 4287; C. S., s. 6785; 1943, c. 100.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-212. What bodies to be furnished.—All officers, agents or servants of the State of North Carolina, or of any county or town in said State, and all undertakers doing business within the State, having charge or control of a dead body required to be buried at public expense, or at the expense of any institution supported by State, county or town funds, shall be and hereby are required immediately to notify, and, upon the request of said Board or its authorized agent or agents, without fee or reward, deliver, at the end of a period not to exceed thirtysix hours after death, such body into the custody of the Board, and permit the Board or its agent or agents to take and remove all such bodies or otherwise dispose of them: Provided, that such body be not claimed within thirty-six hours after death to be disposed of without expense to the State, county or town, by any relative within the second degree of consanguinity, or by the husband or wife of such deceased person: Provided, further, that the thirty-six hour limit may be prolonged in cases within the jurisdiction of the coroner where retention for a longer time may be necessary: Provided, further, that the bodies of all such white prisoners dying while in Central Prison or road camps of Wake County, whether death results from natural causes or otherwise, shall be equally distributed among the white funeral homes in Raleigh, and the bodies of all such negro prisoners dying under similar conditions shall be equally distributed among the negro funeral homes in Raleigh; but only such funeral homes can qualify hereunder as at all times maintain a regular licensed embalmer: Provided, further, that nothing herein shall require the delivery of bodies of such prisoners to funeral directors of Wake County where the same are claimed by relatives or friends.

Whenever the dead body is that of an inmate of any State hospital, the State School for the Deaf, the State School for the Deaf, Dumb and Blind, or of any traveler or stranger, it may be embalmed and delivered to the North Carolina

Board of Anatomy, but it shall be surrendered to the husband or wife of the deceased person or any other person within the second degree of consanguinity upon demand at any time within ten days after death upon the payment to said Board of the actual cost to it of embalming and preserving the body. (1903, c. 666, s. 2; Rev., s. 4288; 1911, c. 188; C. S., s. 6786; 1923, c. 110; 1937, c. 351; 1943, c. 100.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-213. Autopsies unlawful without consent of Board.—It is hereby declared unlawful to hold an autopsy on any dead human body subject to the provisions of this article without first having obtained the consent, in writing, of the chairman of the Board or of his accredited agent: Provided, that nothing in this article shall limit the coroner in the fulfillment of his duties: Provided, further, that nothing in §§ 90-211 through 90-216, inclusive, shall prevent a person from making testamentary disposition of his or her body after death. (1903, c. 666, s. 3; Rev., s. 4289; 1911, c. 188; C. S., s. 6787; 1943, c. 100.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-214. Bodies to be distributed to medical schools.—The bodies obtained under this article shall be distributed, with due precautions to shield them from the public view, among the several medical schools in a proportion to be agreed upon by a majority of the members of the North Carolina Board of Anatomy, such bodies to be used within the State for the advancement of science. (1903, c. 666, s. 4; Rev., s. 4290; C. S., s. 6788; 1943, c. 100.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-215. How expenses paid.—All expenses for the delivery, distribution and embalming of the dead bodies obtained under this article upon the request of the North Carolina Board of Anatomy, under such rules and regulations as the Board may provide shall be borne by the medical school receiving same, and in no case shall the State or any county or town be liable therefor. (1903, c. 666, s. 5; Rev., s. 4291; C. S., s. 6789; 1943, c. 100.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-216. Violation of article misdemeanor.—Any person failing or refusing to perform any duty imposed by this article, or violating any of its provisions shall be guilty of a misdemeanor, punishable by a fine and/or imprisonment in the discretion of the court. (1903, c. 666, s. 6; Rev., s. 3567; C. S., s. 6790; 1943, c. 100.)

Editor's Note.—The 1943 amendment rewrote this section.

ARTICLE 15.

· Autopsies.

§ 90-217. Limitation upon right to perform autopsy.—The right to perform an autopsy upon the dead body of a human being shall be limited to cases specially provided by statute or by direction or will of the deceased; cases where a coroner or the majority of a coroner's jury deem it necessary upon an inquest to have such an autopsy; and cases where the husband or wife or one of the next of kin or nearest known relative or other person charged by law with the duty of burial, in the order named and as known, shall authorize such examination or autopsy. (1931, c. 152; 1933, c. 209.)

Cross References.—As to authority of prosecuting officer, see § 15-7. As to coroners, see § 152-7. As to authority of cadavers for medical schools, see § 90-213.

Editor's Note.—The 1933 amendment deleted the words "for the purpose of ascertaining the cause of death," which formerly appeared at the end of this section. The right of burial belongs to the surviving relations in the order of inheritance. See Floyd v. R. R., 167 N. C. 55, 83 S. E. 12 (1914); 9 N. C. Law Rev. 348.

Cited in Gurganious v. Simpson, 213 N.

C. 613, 197 S. E. 163 (1938).

- § 90-218. Post-mortem examination of inmates of certain public institutions.—Upon the death of any inmate of any institution now maintained, or in the future established, by the State, or any city, county or other political subdivision of the State, for the care of the sick, the feeble-minded or insane, the superintendent, or other administrative head of such institution in which such death occurs, is empowered to authorize a post-mortem examination of the deceased person. Such examination shall be of such scope and nature as may be thought necessary or desirable to promote knowledge of the human organism and the disorders to which it is subject. (1943, c. 87, s. 1.)
- § 90-219. Post-mortem examinations in certain medical schools.— The post-mortem examinations and studies authorized may be made in the laboratories of incorporate medical schools of colleges and universities on such conditions as may be agreed upon by the superintendent, or other administrative head of such institution, authorizing the examination and the head of the medical school undertaking to make the examination. (1943, c. 87, s. 2.)
- § 90-220. Written consent for post-mortem examinations required.—No superintendent, or other administrative head of such institution, shall authorize any post-mortem examination, as described in §§ 90-218 and 90-219, without first securing the written consent of the deceased person's husband or wife, or one of the next of kin, or nearest known relative or other person charged by law with the duty of burial, in the order named and as known. A copy of the written consent shall be filed in the office of the superintendent, or other administrative head of the institution wherein said inmate dies. (1943, c. 87, s. 3.)

ARTICLE 16.

Dental Hygiene Act.

- § 90-221. Definitions.—(a) "Dental hygiene" as used in this article shall mean the treatment of human teeth by removing therefrom calcareous deposits and by removing accumulated accretion from directly beneath the free margin of the gums and polishing the exposed surface of the teeth, provided that nothing in this article shall be construed as affecting the practice of medicine or the practice of dentistry as provided by law, nor so construed as to prevent the performance of the acts herein referred to in colleges or universities under the supervision of instructors; (b) "dental hygienist" as used in this article shall mean any person who practices dental hygiene; (c) "license" shall mean a certificate issued to any applicant upon completion of requirements for admission to practice dental hygiene; (d) "renewal certificate" shall mean the annual certificate of renewal of license to continue practice of dental hygiene in the State of North Carolina; (e) "board" shall mean "The North Carolina State Board of Dental Examiners" created by chapter one hundred thirty-nine, Public Laws of one thousand eight hundred and seventy-nine, and chapter one hundred and seventy-eight, Public Laws of one thousand nine hundred and fifteen as continued in existence by § 90-22. (1945, c. 639, s. 1.)
- § 90-222. Administration of article.—The Board is hereby vested with the authority and is charged with the duty of administering the provisions of this article. (1945, c. 639, s. 2.)
- § 90-223. Powers and duties of Board.—The Board shall have authority, in the administration of this article, to fix the time of examinations for the grant-

ing of licenses to dental hygienists; form of application to be filed; the type of examination to be given, whether written or oral or a combination of both, and to make such rules and regulations as may be necessary and reasonable to carry out the provisions of this article.

The Board shall keep on file in its office at all times a complete record of the names, addresses, license numbers and renewal certificate numbers of all persons

entitled to practice dental hygiene in this State. (1945, c. 639, s. 3.)

- § 90-224. Eligibility for examination.—Any person of good moral character over nineteen (19) years of age who is a citizen of any state of the United States or of the United States of America, a graduate of an accredited high school who has successfully completed training in a school of dental hygiene approved by the Board, shall be eligible to take an examination for a license to practice dental hygiene in the State of North Carolina. (1945, c. 639, s. 4.)
- § 90-225. Examination of applicants; issuance of license.—Any person desiring to obtain a license to practice dental hygiene after having complied with the rules and regulations of the Board under its authority to determine eligibility, shall be entitled to an examination by the Board upon such subjects as the Board may deem necessary, which examination may be written or oral or a combination of both, as in the opinion of the Board will be practical or necessary to test the qualifications of the applicant.

As soon as possible after the examination has been given, the Board, under rules and regulations adopted by it, shall determine the qualifications of the applicant and shall issue to each person successfully meeting the qualifications a license which shall entitle the person to practice dental hygiene in the State of North Carolina, subject to the requirements hereinafter provided for annual re-

newal certificate. (1945, c. 639, s. 5.)

- § 90-226. Renewal certificates.—On or before the first of January next following the obtaining of a license to practice dental hygiene, the holder of such license shall obtain from the Board a renewal certificate, which renewal certificate shall authorize the holder of a license certificate to continue the practice of dental hygiene in the State of North Carolina for the current calendar year and on or before each January first thereafter, such holder of a license certificate shall obtain from the Board a renewal certificate, which renewal certificate shall authorize the practice by such person of dental hygiene for the year for which the renewal certificate is issued. (1945, c. 639, s. 6.)
- § 90-227. Renewal of license.—Any person who has obtained from the Board a license certificate to practice dental hygiene in the State of North Carolina and who shall fail to obtain a renewal certificate for any year, shall before resuming the practice of dental hygiene make application to the Board under such rules as it may prescribe for the renewal of the license to practice dental hygiene and upon such application being made the Board shall determine that such applicant possesses the qualifications prescribed for the granting of a license to practice dental hygiene and that the applicant continues to possess a good moral character and is not otherwise disqualified to practice dental hygiene in the State of North Carolina, and thereupon issue a renewal certificate for the practice of dental hygiene for the calendar year in which the renewal certificate is issued, and thereafter such person shall have the right to make application annually for the renewal certificate as if there had been no failure to obtain for one year a renewal certificate. (1945, c. 639, s. 7.)
- § 90-228. Revocation or suspension of license or renewal certificate.—The Board may revoke or suspend the license or renewal certificate of any person upon proof satisfactory to said Board:

(a) That a license or registration was procured through fraud or misrep-

resentation.

(b) That the holder thereof has been convicted of an offense involving moral turpitude.

(c) That the holder thereof is guilty of chronic or periodic inebriety or ad-

diction to habit forming drugs.

(d) That the holder thereof is guilty of advertising professional superiority or the performance of professional service in a superior manner; advertising prices for professional services; advertising by means of large display, glaring light signs or containing as a part thereof representation of a tooth, teeth or any other portion of the human head; employing or making use of solicitors or free publicity agents directly or indirectly; advertising any free dental work or free examination; advertising to guarantee any service.

(e) That such holder is guilty of hiring, supervising, permitting or aiding

unlicensed persons to practice dental hygiene.

(f) That such holder is guilty of conduct which disqualifies him to practice

dental hygiene with safety to the public.

(g) That such person practices dental hygiene in any place or establishment not authorized by this article.

(h) That such person is guilty of unprofessional conduct.

The following acts on the part of a licensed dental hygienist are hereby declared to constitute unprofessional conduct: (1) Practicing while his or her license is suspended, (2) practicing without a renewal certificate, (3) willfully deceiving or attempting to deceive the Board or its agents with reference to any matter under investigation by the Board, (4) practicing dental hygiene under a false or assumed name or any name except the full name which was used in making application and in the license granted by the Board or under her married name, established to the satisfaction of the Board, (5) violating this article or the provisions of article 2 of this chapter, or violating or aiding any person to knowingly violate the Dental Practice Act or Dental Hygiene Act of any state or territory, and (6) practicing in the employment of or in association with any person who is practicing in an unlawful or unprofessional manner.

The foregoing specifications of acts constituting unprofessional conduct shall not be construed as a complete definition of unprofessional conduct nor as authorizing or permitting the performance of other or similar acts not denounced or as fimiting or restricting the said Board from holding that other or similar acts also

constitute unprofessional conduct. (1945, c. 639, s. 8.)

- § 90-229. Procedure for renewal of certificate.—The procedure for the renewal of a certificate by the Board shall be the same in form and manner as prescribed in § 90-31. (1945, c. 639, s. 9.)
- § 90-230. Discipline of dental hygienist.—The procedure for the revocation of a license or for other discipline of a holder of a certificate under this article shall be the same in form and manner as prescribed in § 90-41. (1945, c. 639, s. 10.)
- § 90-231. Fees and disposition thereof.—The fees which shall be charged by the Board for the performance of the duties imposed upon it by this article shall be as follows: (1) Examination fee, twenty dollars (\$20.00); (2) issuance of annual renewal certificate, two dollars (\$2.00); (3) restoration of license, twenty dollars (\$20.00).

All fees shall be payable in advance to the Board and shall be disposed of by the Board in the discharge of its duties under this article, with any surplus to be dis-

posed of as provided in article 2 of this chapter. (1945, c. 639, s. 11.)

§ 90-232. Practice of dental hygiene.—The holder of a license certificate for the year in which the same is issued, or of a renewal certificate for the current year, shall have the right to practice dental hygiene in this State in the office of any duly licensed dentist; in a clinic or in clinics in the public schools of the State of

North Carolina, as an employee of the State Board of Health; in a clinic or in clinics in a State institution as an employee of the institution; in a clinic in any industrial establishment as an employee of such establishment where services are rendered only to bona fide employees of the industrial establishment; or in a clinic established by a hospital, as an employee of the hospital, where service is rendered only to patients of such hospital. No dentist in private practice shall employ more than one dental hygienist at one and the same time. In a clinic the necessary number of dental hygienists may be employed, but no clinic shall be operated or maintained except under the supervision and direction of a licensed dentist. (1945, c. 639, s. 12.)

§ 90-233. Violation a misdemeanor.—Any person who shall violate, or aid or abet another in violating, any of the provisions of this article shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court. (1945, c. 639, s. 13.)

Chapter 91.

Pawnbrokers.

Sec.

91-1. Pawnbroker defined.

91-2. License; business confined to municipalities.

91-3. Municipal authorities to grant and control license; bond.

Sac

91-4. Records to be kept.

91-5. Pawn ticket.

91-6. Sale of pledges.

91-7. Usury law applicable.

91-8. Violation of chapter misdemeanor.

§ 91-1. Pawnbroker defined.—Any person, firm, or corporation who shall engage in the business of lending or advancing money on the pledge and possession of personal property, or dealing in the purchasing of personal property or valuable things on condition of selling the same back again at stipulated prices, is hereby declared and defined to be a pawnbroker. (1915, c. 198, s. 1; C. S., s. 7000.)

§ 91-2. License; business confined to municipalities.—No person, firm, or corporation shall engage in the business of lending money, or other things, for profit or on account of specific articles of personal property deposited with the lender in pledge in this State, which business is commonly known as that of pawnbrokers, except in incorporated cities and towns, and without first having obtained a license to do so from such incorporated cities and towns, and by paying the county, State, and municipal license tax required by law, and otherwise complying with the requirements made in this and succeeding sections. (1915, c. 198, s. 1; C. S., s. 7001.)

Cross Reference.—As to the State license tax, see § 105-50.

- § 91-3. Municipal authorities to grant and control license; bond.— The board of aldermen, or other governing body, of any city or town in this State may grant to such person, firm, or corporation as it may deem proper, and who shall produce satisfactory evidence of good character, a license authorizing such person, firm, or corporation to carry on the business of a pawnbroker, which said license shall designate the house in which such person, firm, or corporation shall carry on said business, and no person, firm, or corporation shall carry on the business of a pawnbroker without being duly licensed, nor in any other house than the one designated in the said license. Every person, firm, or corporation so licensed to carry on the business of a pawnbroker shall, at the time of receiving such license, file with the mayor of the city or town granting the same, a bond payable to such city or town in the sum of one thousand dollars, to be executed by the persons so licensed and by two responsible sureties, or a surety company licensed to do business in the State of North Carolina, to be approved of by such mayor, which said bond shall be for the faithful performance of the requirements and obligations pertaining to the business so licensed. The board of aldermen, or other governing body, shall have full power and authority to revoke such license and sue for forfeiture of the bond upon a breach thereof. Any person who may obtain a judgment against a pawnbroker and upon which judgment execution is returned unsatisfied, may maintain an action in his own name upon the said bond of said pawnbroker, in any court having jurisdiction of the amount demanded, to satisfy said judgment. (1915, c. 198, s. 2; C. S., s. 7002.)
- § 91-4. Records to be kept.—Every pawnbroker shall keep a book in which shall be legibly written, at the time of the loan, an account and description of the goods, articles or things pawned or pledged, the amount of money loaned thereon, the time of pledging the same, the rate of interest to be paid on said loan,

and the name and residence of the person pawning or pledging the said goods, articles, or things. (1915, c. 198, s. 3; C. S., s. 7003.)

- § 91-5. Pawn ticket.—And every such pawnbroker shall at the time of each loan deliver to the person pawning or pledging any goods, articles, or things a ticket or memorandum or note signed by him containing the substance of the entry required to be made by him in his book as aforesaid, and a copy of the said ticket, memorandum, or note so given to the person pawning or pledging any goods, articles, or things of value, shall be filed within forty-eight hours in the office of the chief of police of the city or town issuing the license to such pawnbroker. The said tickets or memorandums so issued shall be numbered consecutively and dated the day issued. (1915, c. 198, s. 3; C. S., s. 7004.)
- § 91-6. Sale of pledges.—No pawnbroker shall sell any pawn or pledge until the same shall have remained sixty days in his possession after the maturity of the debt for which the property was pledged. And no pawnbroker shall advertise or sell at his place of business as unredeemed pledges any articles of property other than those received by him as pawns or pledges in the usual course of his business at the place where he is licensed to do business. (1915, c. 198, s. 4; C. S., s. 7005.)

Cross Reference.—As to sale of pledged goods, see § 105-50.

- § 91-7. Usury law applicable.—The provisions of this chapter shall not be construed to relieve any person from the penalty incurred under the laws against usury in this State. (1915, c. 198, s. 5; C. S., s. 7006.)
- § 91-8. Violation of chapter misdemeanor.—Any person, firm, or corporation violating the provisions of this chapter shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1915, c. 198, s. 5; C. S., s. 7007.)

Chapter 92. Photographers.

§§ 92-1 to 92-29: Deleted.

Cross References.—As to prevention of certain fraudulent practices by photographers, see §§ 66-59 to 66-64. As to coupons redeemable in products of photography, see §§ 66-59 to 66-64. As to privilege tax

on photographers, see § 105-41.

Editor's Note.-This chapter, which had its origin in Public Laws 1935, c. 155, enacted to regulate the practice of photography through the agency of an examining board, has been deleted because of its

invalidity.

Chapter Held Unconstitutional.—Chapter 92 of the General Statutes, relating to the licensing and supervision of photographers, was held unconstitutional as violative of Art. I, §§ 1, 17 and 31 of the State Constitution. State v. Ballance, 229 N. C. 764, 51 S. E. (2d) 731 (1949), overruling State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366 (1938).

For decisions of other jurisdictions which have held practically identical statutes invalid, see Buehman v. Bechtel, 57 Ariz. 363, 114 P. (2d) 227, 134 A. L. R. 1374 (1941); Sullivan v. DeCerb, 156 Fla. 496, 23 So. (2d) 571 (1945); Bramley v. State, 187 Ga. 826, 2 S. E. (2d) 647 (1939); Territory v. Kraft, 33 Haw. 397; State v. Cromwell, 72 N. D. 565, 9 N. W. (2d) 914; Wright v. Wiles, 173 Tenn. 334, 117 S. W. (2d) 736, 119 A. L. R. 456 (1938); Moore v. Sutton, 185 Va. 481, 39 S. E.

(2d) 348 (1946).

Not Valid Exercise of Police Power and Violative of Constitutional Guaranties.— "When chapter 92 of the General Statutes is laid alongside the relevant legal authorities and principles, it is plain that it is not a valid exercise of the police power of the State, and that it violates the constitutional guaranties securing to all men the right to 'liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness' and providing that no person is to be deprived of 'liberty or property, but by the law of the land.' It unreasonably obstructs the common right of all men to choose and follow one of the ordinary lawful and harmless occupations of life as a means of livelihood, and bears no rational, real, or substantial relation to the public health, morals, order, or safety, the general welfare. Instead, it is addressed to the interests of a particular class rather than the good of society as a whole, and tends to promote a monopoly in what is essentially a private business." State v. Ballance, 229 N. C. 764, 772, 51 S. E. (2d) 731 (1949).

Sec.

Chapter 93.

Public Accountants.

- "Public accounting" defined. 93-1. 93-8. Use of title "public accountant" 93-2. Qualifications. without qualification. Unlawful use of title "certified pub-Assistants need not be certified. lic accountant" by individual. 93-10. Persons certified in other states. 93-4. Use of title by firm. 93-11. Not applicable to officers of State, 93-5. Use of title by corporation. county or municipality. 93-12. Board of Accountancy; powers and Practice without certificate unlawful; corporations; exceptions.
- § 93-1. "Public accounting" defined.—The term "practice of public accounting" as used in this chapter is defined as follows:

A person engages in the practice of public accounting, within the meaning and intent of this chapter, who offers his or her services to the public as one who is qualified to render professional service in the analysis, verification and audit of financial records and the interpretation of such service through statements and reports. (1925, c. 261, s. 1; 1929, c. 219, s. 1.)

Editor's Note.—Chapter 261 of the Public Laws of 1925 was probably intended to cure defects and omissions of the former statutes. Respass v. Rex Spinning Co., 191 N. C. 809, 133 S. E. 391 (1926). The 1925 act expressly repealed Public Laws 1913, c. 157, codified as C. S., §§ 7008 to 7024.

93-7. Registration of accountants already

practicing.

However, many of the provisions of the old act were re-enacted by the repealing act and will be found in this chapter. For other cases decided under the 1913 act, see note to § 19-12.

93-13. Violation of chapter; penalty.

Applied in Scott v. Gillis, 197 N. C. 223, 148 S. E. 315 (1929).

- § 93-2. Qualifications.—Any citizen of the United States, or person who has duly declared his intention of becoming such citizen, over twenty-one years of age and of good moral character, and who shall have received from the State Board of Accountancy a certificate of qualification admitting him to practice as a certified public accountant as hereinafter provided, or who is the holder of a valid and unrevoked certificate issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, shall be licensed to practice and be styled and known as a certified public accountant. (1925, c. 261, s. 2.)
- § 93-3. Unlawful use of title "certified public accountant" by individual.—It shall be unlawful for any person who has not received a certificate of qualification admitting him to practice as a certified public accountant to assume or use such a title, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the person using same has been admitted to practice as a certified public accountant. (1925, c. 261, s. 3.)

Editor's Note. — This section was reviewed in 3 N. C. Law Rev. 149.

§ 93-4. Use of title by firm.—It shall be unlawful for any firm, copartnership, or association to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the members of such firm, copartnership or association have been admitted to practice as certified public accountants, unless each of the members of such firm, copartnership or association first shall have received a certificate of qualification from the State Board of Accountancy admitting him to practice as a certified public accountant. (1925, c. 261, s. 4.)

- § 93-5. Use of title by corporation.—It shall be unlawful for any corporation to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that such corporation has received a certificate of qualification from the State Board of Accountancy admitting it to practice as a certified public accountant. (1925, c. 261, s. 5.)
- § 93-6. Practice without certificate unlawful; corporations; exceptions.—It shall be unlawful for any person, firm, copartnership or association to engage in the practice of public accounting in the State of North Carolina unless such person, or each of the members of such firm, copartnership or association first shall have received from the State Board of Accountancy a certificate of qualification admitting him to practice as a certified public accountant. It shall be unlawful for any corporation to engage in the practice of public accounting in the State of North Carolina: Provided, however, that nothing herein contained shall be construed to prohibit the practicing of the profession of public accounting by any person, firm, copartnership, association, or corporation who shall on March 10, 1925, be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, or an accountant who has served two years or more as a civil service employee of the federal government in the capacity of senior field auditor. (1925, c. 261, s. 6.)
- § 93-7. Registration of accountants already practicing.—Any person, firm, copartnership, association or corporation who shall on March 10, 1925, be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, may, within six months thereafter, apply to the State Board of Accountancy for registration as a public accountant, and the State Board of Accountancy, upon the production of satisfactory evidence that such applicant was engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina on March 10, 1925, shall register such person, firm, copartnership, association or corporation. Such registration shall be conclusive evidence of the right of such person, firm, copartnership, association or corporation to engage in the practice of public accounting in the State of North Carolina, but such registration shall not be construed in any way as indicating that the State of North Carolina or the State Board of Accountancy has approved the educational and professional experience and qualifications of the registrant. (1925, c. 261, s. 7.)
- § 93-8. Use of title "public accountant" without qualification.— It shall be unlawful for any person, firm, copartnership, association or corporation, not having qualified under this chapter, to assume or use the style of title of public accountant, or other means of identification to indicate that such person, firm, copartnership, or association or corporation is engaged in the practice of public accounting in the State of North Carolina: Provided, however, that the inhibitions of this section shall not be construed to apply to any person, firm, copartnership, association or corporation who on March 10, 1925, was engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina. (1925, c. 261, s. 8.)
- § 93-9. Assistants need not be certified.—Nothing contained in this chapter shall be construed to prohibit the employment by a certified public accountant or by any person, firm, copartnership, association, or corporation permitted to engage in the practice of public accounting in the State of North Carolina, of persons who have not received certificates of qualification admitting them to practice as certified public accountants, as assistant accountants or clerks: Provided, that such employees work under the control and supervision of certified public accountants or public accountants, and do not certify to anyone the accuracy or verification of audits or statements; and provided further, that such

employees do not hold themselves out as engaged in the practice of public accounting. (1925, c. 261, s. 9.)

- § 93-10. Persons certified in other states.—A public accountant who holds a valid and unrevoked certificate as a certified public accountant, or its equivalent, issued under authority of any state, or the District of Columbia, and who resides without the State of North Carolina, may perform work within the State: Provided, that he register with the State Board of Accountancy and comply with its rules regarding such registration. (1925, c. 261, s. 10.)
- § 93-11. Not applicable to officers of State, county or municipality.—Nothing herein contained shall be construed to restrict or limit the power or authority of any State, county or municipal officer or appointee engaged in or upon the examination of the accountants of any public officer, his employees or appointees. (1925, c. 261, s. 12.)

Cross References.—As to municipal accounting, see § 160-290. As to county accounting systems, see § 153-30.

- § 93-12. Board of Accountancy; powers and duties.—The State Board of Accountancy shall consist of four persons to be appointed by the Governor, all of whom shall be the holders of valid and unrevoked certificates as certified public accountants heretofore issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, or issued under the provisions of this chapter. They shall hold office for the term of three years and until their successors are appointed: Provided, that no appointments to the Board shall be made under the provisions of this chapter until the expiration of the terms of the members of the present Board. The powers and duties of the Board shall be as follows:
- (1) To elect from its members a president, vice-president and secretary-treasurer. The members of the Board shall be paid, for the time actually expended in pursuance of the duties imposed upon them by this chapter, an amount not exceeding ten dollars (\$10) per day, and they shall be entitled to necessary traveling expenses.

(2) To employ legal counsel and clerical assistance and to fix the compensation of same, and to incur such other expenses as may be deemed necessary to carry

into effect the provisions of this chapter.

(3) To formulate rules for the government of the Board and for the examination of applicants for certificates of qualifications admitting such applicants to practice as certified public accountants.

(4) To hold written or oral examinations of applicants for certificates of qualification at least once a year, or oftener, as may be deemed necessary by the Board.

(5) To issue certificates of qualification admitting to practice as certified public accountants each applicant, who, being the graduate of an accredited high school or having an equivalent education, shall have had at least two years' experience or its equivalent next preceding the date of his application on the field staff of a certified public accountant or public accountant, one of which shall have been as a senior or accountant in charge, and who shall receive the endorsement of three certified public accountants of any state as to his eligibility to become a certified public accountant; or who, in lieu of the two years' experience or its equivalent, above mentioned, shall have had one year's experience after graduating from a recognized school of accountancy; or an accountant who has served two years or more as a civil service employee of the federal government in the capacity of senior field auditor, and who shall have passed a satisfactory examination in "theory of accounts," "practical accounting," "auditing," "commercial law" and other related subjects.

(6) In its discretion to grant certificates of qualification admitting to practice as

certified public accountants such applicants who shall be the holders of valid and unrevoked certificates as certified public accountants, or the equivalent, issued by or under the authority of any state, or territory of the United States or the District of Columbia; or who shall hold valid and unrevoked certificates or degrees as certified public accountants, or the equivalent, issued under authority granted by a foreign nation; when in the judgment of the Board the requirements for the issuing or granting of such certificates or degrees are substantially equivalent to the requirements established by this chapter: Provided, however, that such applicants signify their intention of engaging in the practice of public accounting within the State.

(7) To charge for each examination and certificate provided for in this chapter a fee of twenty-five dollars. This fee shall be payable to the secretary-treasurer of the Board by the applicant at the time of filing application. If at any examination an applicant shall have received a passing grade in one subject, he shall have the privilege of one re-examination at any subsequent examination held within eighteen months from the date of his application upon payment of a re-examination fee of fifteen dollars. In no case shall the examination fee be refunded, unless in the discretion of the Board the applicant shall be deemed ineligible for examination.

(8) To require the renewal of all certificates of qualification annually on the first day of July, and to charge and collect a fee not to exceed five dollars for such

renewal.

(9) The Board shall have the power to revoke any certificate issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, or issued under the provisions of this chapter, for good and sufficient cause: Provided, that written notice shall have been mailed to the holder of such certificate at his last known address thirty days before any hearing thereof, stating the cause of such contemplated action, and appointing a time for a hearing thereon by the Board, and provided further, that no certificate shall be revoked until such hearing shall have been had. At all such hearings the Attorney General of the State, or one of his assistants designated

by him, shall sit with the Board with all the powers of a member thereof.

(10) Within sixty days after March 10, 1925, the Board shall formulate rules for the registration of those persons, firms, copartnerships, associations or corporations who, not being holders of valid and unrevoked certificates as certified public accountants issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, and who, having on March 10, 1925, been engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, shall, under the provisions of § 93-7 apply to the Board for registration as public accountants. The Board shall maintain a register of all persons, firms, copartnerships, associations or corporations who have made application for such registration and have complied with the rules of registration adopted by the Board.

(11) Within sixty days after March 10, 1925, the Board shall formulate rules for registration of these public accountants who are qualified to practice under this chapter and who under the provisions of § 93-10 are permitted to engage in work within the State of North Carolina. The Board shall have the power to deny or withdraw the privilege herein referred to for good and suffi-

cient reasons.

(12) To submit to the Commissioner of Revenue the names of all persons who have qualified under this chapter as practitioners of public accountancy, and who have complied with the rules of the Board. The Commissioner of Revenue shall issue only to those whose names are so submitted to him by the Board a license for the privilege of practicing the profession of public accountancy, and the license so issued shall be evidence of his registration with the Board.

(13) The Board shall keep a complete record of all its proceedings and shall

annually submit a full report to the Governor.

(14) All fees collected on behalf of the State Board of Accountancy, and all receipts of every kind and nature, as well as the compensation paid the members of the Board and the necessary expenses incurred by them in the performance of the duties imposed upon them by this chapter, shall be reported annually to the State Treasurer. Any surplus remaining in the hands of the Board over the amount of three hundred dollars shall be paid to the State Treasurer at the time of submitting the report, and shall go to the credit of the general fund: Provided, that no expense incurred under this chapter shall be charged against the State.

(15) Any certificate of qualification issued under the provisions of this chapter, or issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, shall be forfeited for the failure of the holder to renew same and to pay the renewal fee therefor to the State Board of Accountancy within thirty days after demand for such renewal fee shall have been made by the State Board of Accountancy. (1925, c. 261, s. 11; 1939, c. 218, s. 1.)

Cross References,—As to uniform revocation of licenses, see chapter 150. As to privilege tax, see § 105-41.

Editor's Note.—The cases cited below were decided under the former law. See note to § 93-1.

Members of Board Are State Officials.— Under the former act creating and incorporating the State Board of Accountancy, its members are to be regarded as State officials to the extent of their duties specified in the statute. State v. Scott, 182 N. C. 865, 109 S. E. 789 (1921).

Exercise of Police Power.—The former statute creating the State Board of Accountancy, with authority to pass upon applications and issue licenses to those qualified as public accountants, was within the exercise of the police powers of the State. State v. Scott, 182 N. C. 865, 109 S. E. 789 (1921).

When License Not Required.—Former § 7023 of the Consolidated Statutes did not embrace within its terms an isolated instance of the employment of a firm of certified public accountants licensed in another state, who sent their representative to this State to acquire information from the books of a corporation for a statement of its condition to be made out in the state in which the auditing concern was authorized to do business. Respass v. Rex

Spinning Co., 191 N. C. 809, 133 S. E. 391

The exercise of the powers of the Board is coextensive with the State boundaries, and may not be exercised beyond them. State v. Scott, 182 N. C. 865, 109 S. E. 789 (1921).

Holding Examination Outside of State.

—Under the 1913 act giving the State Board of Accountancy the power to examine and license applicants, and stating that the Board may do so "at such place as it may designate," the discretion of the Board in the exercise of this power will be confined to places within the boundaries of this State. State v. Scott, 182 N. C. 865, 109 S. E. 789 (1921).

Where a statute gives the Board the power to determine upon examination whether applicants for licenses therein are qualified to receive them, it is for the courts of the State, upon proper action, to pass upon the question of whether the Board acts ultra vires in holding an examination beyond the boundaries of the State upon the request of a nonresident desiring to obtain a certificate, and a declaration in the fixing of such place that it would be the last time the Board would hold an examination outside the State is not binding or controlling on the question. State v. Scott, 182 N. C. 865, 109 S. E. 789 (1921).

§ 93-13. Violation of chapter; penalty.—Any violation of the provisions of this chapter shall be deemed a misdemeanor, and upon conviction thereof the guilty party shall be fined not less than fifty dollars and not exceeding two hundred dollars for each offense. (1925, c. 261, s. 11.)



Division XIII. Employer and Employee.

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Chapter 94.

Apprenticeship.

Sec. Sec. 94-1. Purpose. 94-6. Definition of an apprentice. 94-2. Apprenticeship Council. 94-7. Contents of agreement. 94-3. Director of Apprenticeship. 94-8. Approval of apprentice agreements; 94-4. Powers and duties of Director of signatures. Apprenticeship. 94-9. Rotation of employment. 94-5. Local and State joint apprenticeship 94-10. [Repealed.] committees. 94-11. Limitation.

§ 94-1. Purpose. — The purposes of this chapter are: To open to young people the opportunity to obtain training that will equip them for profitable employment and citizenship; to set up, as a means to this end, a program of voluntary apprenticeship under approved apprentice agreements providing facilities for their training and guidance in the arts and crafts of industry and trade, with parallel instruction in related and supplementary education; to promote employment opportunities for young people under conditions providing adequate training and reasonable earnings; to relate the supply of skilled workers to employment demands; to establish standards for apprentice training; to establish an Apprenticeship Council and local and State joint apprenticeship committees to assist in effectuating the purposes of this chapter; to provide for a Director of Apprenticeship within the Department of Labor; to provide for reports to the legislature and to the public regarding the status of apprentice training in the State; to establish a procedure for the determination of apprentice agreement controversies; and to accomplish related ends. (1939, c. 229, s. 1.)

Editor's Note.—For comment on this chapter, see 17 N. C. Law Rev. 327.

§ 94-2. Apprenticeship Council.—The Commissioner of Labor shall appoint an Apprenticeship Council, composed of three representatives each from employer and employee organizations respectively. The State official who has been designated by the State Board for Vocational Education as being in charge of trade and industrial education shall ex officio be a member of said Council, without vote. The terms of office of the members of the Apprenticeship Council first appointed by the Commissioner of Labor shall expire as designated by the Commissioner at the time of making the appointment: One representative each of employers, employees, being appointed for one year; one representative each of employers, employees, being appointed for two years, and one representative each of employers and employees for three years. Thereafter, each member shall be appointed for a term of three years. Any member appointed to fill a vacancy occurring prior to the expiration of the term of his predecessor shall be appointed for the remainder of said term. Each member of the Council, not otherwise compensated by public monies, shall be reimbursed for transportation and shall receive such per diem compensation as is provided generally for boards and commissions under the biennial Maintenance Appropriation Acts for each day spent in attendance at meetings of the Apprenticeship Council.

The Apprenticeship Council shall meet at the call of the Commissioner of Jabor and shall aid him in formulating policies for the effective administration of this chapter. Subject to the approval of the Commissioner, the Apprenticeship Council shall establish standards for apprentice agreement which in no case shall be lower than those prescribed by this chapter, shall issue such rules and regulations as may be necessary to carry out the intent and purposes of said chapter, and shall perform such other functions as the Commissioner may direct.

Not less than once a year the Apprenticeship Council shall make a report through the Commissioner of Labor of its activities and findings to the legislature and to the public. (1939, c. 229, s. 2.)

- § 94-3. Director of Apprenticeship. The Commissioner of Labor is hereby directed to appoint a Director of Apprenticeship which appointment shall be subject to the confirmation of the State Apprenticeship Council by a majority vote. The Commissioner of Labor is further authorized to appoint and employ such clerical, technical, and professional help as shall be necessary to effectuate the purposes of this chapter. (1939, c. 229, s. 3.)
- § 94-4. Powers and duties of Director of Apprenticeship.—The Director, under the supervision of the Commissioner of Labor and with the advice and guidance of the Apprenticeship Council is authorized to administer the provisions of this chapter; in co-operation with the Apprenticeship Council and local and State joint apprenticeship committees, to set up conditions and training standards for apprentice agreements, which conditions or standards shall in no case be lower than those prescribed by this chapter; to act as secretary of the Apprenticeship Council and of each State joint apprenticeship committee; to approve for the Council if in his opinion approval is for the best interest of the apprentice, any apprentice agreement which meets the standards established under this chapter; to terminate or cancel any apprentice agreement in accordance with the provisions of such agreement; to keep a record of apprentice agreements and their disposition; to issue certificates of completion of apprenticeship; and to perform such other duties as are necessary to carry out the intent of this chapter: Provided, that the administration and supervision of related and supplemental instruction for apprentices, co-ordination of instruction with job experiences, and the selection and training of teachers and co-ordinators for such instruction shall be the responsibility of State and local boards responsible for vocational education. (1939, c. 229, s. 4.)
- 94-5. Local and State joint apprenticeship committees. A local joint apprenticeship committee may be appointed, in any trade or group of trades in a city or trade area, by the Apprenticeship Council, whenever the apprentice training needs of such trade or group of trades justifies such establishment: Provided, that when a State joint apprenticeship committee in any trade or group of trades shall have been established, as hereinafter authorized, such State committee shall thereafter have the power of appointment of local joint apprenticeship committees in the trade or group of trades which it represents. Such local joint apprenticeship committee shall be composed of an equal number of employer and employee representatives chosen from names submitted by the respective local employer and employee organizations in such trade or group of trades. In a trade or group of trades in which there is no bona fide local employer or employee organization, the committee shall be appointed from persons known to represent the interests of employers and of employees respectively. The function of a local joint apprenticeship committee shall be: To co-operate with school authorities in regard to the education of apprentices; in accordance with the standards set up by the apprenticeship committee for the same trade or group of trades, where such committee has been appointed, to work in an advisory capacity with employers and employees in matters regarding schedule of operations, application of wage rates, and working conditions for apprentices and to specify the number of apprentices which shall be employed locally in the trade under apprentice agreements under the chapter; and to adjust apprenticeship disputes, subject to the approval of the director. Until the appointment of a State joint apprenticeship committee for any trade or group of trades, as hereinafter provided, the local joint apprenticeship committee for that trade or group of trades shall, for the city or trade area for which it is appointed,

exercise the functions of the State joint apprenticeship committee for the said

trade or group of trades which it represents.

When two or more local joint apprenticeship committees have been established in the State for a trade or group of trades, or at the request of any trade or group of trades, the Apprenticeship Council may appoint a State joint apprenticeship committee for such trade or group of trades, composed of an equal number of employer and employee representatives chosen from names submitted by the respective employer and employee organizations. In a trade or group of trades in which there is no bona fide employer or employee organization, the Apprenticeship Council may appoint such a committee from persons known to represent the interests of employers and employees respectively. The functions of a State joint apprenticeship committee shall be: To co-ordinate the activities of local joint apprenticeship committees in the trade or group of trades which it represents; to ascertain the prevailing rate for journeymen in the respective trade areas within the State in such trade or trades and specify the graduated scale of wages applicable to apprentices in such trade or trades in each such area; to ascertain employment needs in such trade or trades and specify the appropriate current ratio of apprentices to journeymen; and to make recommendations for the general good of apprentices engaged in the trade or trades represented by the committee. The members of a State joint apprenticeship committee shall be reimbursed for transportation and shall receive such per diem compensation as is provided generally for boards and commissions under the biennial Maintenance Appropriation Acts for each day spent in attendance at meetings of the committee. (1939, c. 229, s. 5.)

- § 94-6. Definition of an apprentice.—The term "apprentice," as used herein, shall mean a person at least sixteen years of age who is covered by a written agreement, with an employer, an association of employers, or an organization of employees acting as employer's agent, and approved by the Apprenticeship Council; which apprentice agreement provides for not less than four thousand hours of reasonably continuous employment for such person for his participation in an approved schedule of work experience and for at least one hundred forty-four hours per year of related supplemental instruction. The required hours for apprenticeship agreements may vary in accordance with standards adopted by local or State joint apprenticeship committees, subject to approval of the State Apprenticeship Council and Commissioner of Labor. (1939, c. 229, s. 6.)
- § 94-7. Contents of agreement. Every apprentice agreement entered into under this chapter shall contain:
 - The names of the contracting parties.
 The date of birth of the apprentice.

(3) A statement of the trade, craft, or business which the apprentice is to be taught, and the time at which the apprenticeship will begin and end.

- (4) A statement showing the number of hours to be spent by the apprentice in work and the number of hours to be spent in related and supplemental instruction, which instruction shall be not less than one hundred forty-four hours per year: Provided, that in no case shall the combined weekly hours of work and of required related and supplemental instruction of the apprentice exceed the maximum number of hours of work prescribed by law for a person of the age and sex of the apprentice.
- (5) A statement setting forth a schedule of the processes in the trade or industry division in which the apprentice is to be taught and the approximate time to be spent at each process.
- (6) A statement of the graduated scale of wages to be paid the apprentice and whether the required school time shall be compensated.

- (7) A statement providing for a period of probation of not more than five hundred hours of employment and instruction extending over not more than four months, during which time the apprentice agreement shall be terminated by the Director at the request in writing of either party, and providing that after such probationary period the apprentice agreement may be terminated by the Director by mutual agreement of all parties thereto, or canceled by the Director for good and sufficient reason. The council at the request of a joint apprentice committee may lengthen the period of probation.
- (8) A provision that all controversies or differences concerning the apprentice agreement which cannot be adjusted locally in accordance with § 94-5 shall be submitted to the Director for determination.
- (9) A provision that an employer who is unable to fulfill his obligation under the apprentice agreement may with the approval of the Director transfer such contract to any other employer: Provided, that the apprentice consents and that such other employer agrees to assume the obligations of said apprentice agreement.
- (10) Such additional terms and conditions as may be prescribed or approved by the Director not inconsistent with the provisions of this chapter. (1939, c. 229, s. 7; 1945, c. 729, s. 1.)

Editor's Note.—The 1945 amendment 94-10" formerly appearing at the end of struck out the phrase "as provided for in § subsection (8).

- § 94-8. Approval of apprentice agreements; signatures.—No apprentice agreement under this chapter shall be effective until approved by the Director. Every apprentice agreement shall be signed by the employer, or by an association of employers or an organization of employees as provided in § 94-9, and by the apprentice, and if the apprentice is a minor, by the minor's father: Provided, that if the father be dead or legally incapable of giving consent or has abandoned his family, then by the minor's mother; if both father and mother be dead or legally incapable of giving consent, then by the guardian of the minor. Where a minor enters into an apprentice agreement under this chapter for a period of training extending into his majority, the apprentice agreement shall likewise be binding for such a period as may be covered during the apprentice's majority. (1939, c. 229, s. 8.)
- § 94-9. Rotation of employment.—For the purpose of providing greater diversity of training or continuity of employment, any apprentice agreement made under this chapter may in the discretion of the Director of Apprenticeship be signed by an association of employers or an organization of employees instead of by an individual employer. In such a case, the apprentice agreement shall expressly provide that the association of employers or organization of employees does not assume the obligation of an employer but agrees to use its best endeavors to procure employment and training for such apprentice with one or more employers who will accept full responsibility, as herein provided, for all the terms and conditions of employment and training set forth in said agreement between the apprentice and employer association or employee organization during the period of each such employment. The apprentice agreement in such a case shall also expressly provide for the transfer of the apprentice, subject to the approval of the Director, to such employer or employers who shall sign in written agreement with the apprentice, and if the apprentice is a minor with his parent or guardian, as specified in § 94-8, contracting to employ said apprentice for the whole or a definite part of the total period of apprenticeship under the terms and conditions of employment and training set forth in the said agreement entered into between the apprentice and employer association or employee organization. (1939, c. 229, s. 9.)

§ 94-10: Repealed by Session Laws 1945, c. 729, s. 2.

Editor's Note.—The repealed section related to the settlement of controversies and complaints.

§ 94-11. Limitation.—Nothing in this chapter or in any apprentice agreement approved under this chapter shall operate to invalidate any apprenticeship provision in any collective agreement between employers and employees, setting up higher apprenticeship standards; provided, that none of the terms or provisions of this chapter shall apply to any person, firm, corporation or crafts unless, until, and only so long as such person, firm, corporation or crafts voluntarily elects that the terms and provisions of this chapter shall apply. Any person, firm, corporation or crafts terminating an apprenticeship agreement, shall notify the Director of Apprenticeship. (1939, c. 229, s. 11; 1945, c. 729, s. 3.)

Editor's Note.—The 1945 amendment added the proviso and the second sentence.

Chapter 95.

Department of Labor and Labor Regulations.

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os-2. Election of Commissioner; term; salary; vacancy.

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ARTICLE 1.

Department of Labor.

§ 95-1. Department of Labor established .- A Department of Labor is hereby created and established. The duties of said Department shall be exercised and discharged under the supervision and direction of a commissioner, to be known as the Commissioner of Labor. (Rev., s. 3909; 1919, c. 314, s. 4; C. S., s. 7309; 1931, c. 312, s. 1.)

Editor's Note.—Public Laws 1931, c. 312, effected a reorganization of the Department of Labor and Printing, henceforth to Law Rev. 413.

§ 95-2. Election of Commissioner; term; salary; vacancy. — The

Commissioner of Labor shall be elected by the people in the same manner as is provided for the election of the Secretary of State. His term of office shall be four years, and he shall receive a salary of nine thousand dollars (\$9000.00) per annum, payable in equal monthly installments. Any vacancy in the office shall be filled by the Governor, until the next general election. The office of the Department of Labor shall be kept in the city of Raleigh and shall be provided for as are other public offices of the State. (Rev., ss. 3909, 3910; 1919, c. 314, s. 4; C. S., s. 7310; 1931, c. 312, s. 2; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 415; 1939, c. 349; 1943, c. 499, s. 2; 1947, c. 1041; 1949, c. 1278.)

Editor's Note.—The 1931 amendment added provisions as to salary and filling vacancies, substituted "Commissioner of Labor" for "Commissioner of Labor and Printing," and omitted a former provision relating to the Assistant Commissioner.

The 1937, 1939 and 1943 amendments increased the salary of the Commissioner,

and the 1947 amendment raised it to \$7,500.00 per year. The 1949 amendment, effective April 23, 1949, increased the salary, from and after the expiration of the present term of office of the Commissioner, to \$9,000.00 per year, payable in equal monthly installments.

§ 95-3. Divisions of Department; Commissioner; administrative officers.—The Department of Labor shall consist of the following officers, divisions and sections:

A Commissioner of Labor.

A Division of Workmen's Compensation, as a separate and distinct unit, the officers of the Industrial Commission or the Division of Workmen's Compensation acting separately and independently of the other officers, divisions and sections herein provided for.

A Division of Standards and Inspections.

A Division of Statistics.

Each division, except the Division of Workmen's Compensation, shall be in the charge of a chief administrative officer and shall be organized under such rules and regulations as the Commissioner of Labor and the head of the division concerned, with the approval of the Governor, shall prescribe and promulgate. The Commissioner of Labor, with the approval of the Governor, may make provision for one person to act as chief administrative officer of two or more divisions, when such is deemed advisable. The chief administrative officers of the several divisions, except the Industrial Commission, shall be appointed by the Commissioner of Labor with the approval of the Governor, and he shall fix their compensation, subject to the approval of the Budget Bureau. The Commissioner of Labor, with the approval of the Governor may combine or consolidate the activities of two or more of the divisions of the Department except the Division of Workmen's Compensation, or provide for the setting up of other divisions when such action shall be deemed advisable for the more efficient and economical administration of the work and duties of the Department. (1931, c. 277; c. 312, s. 4; 1933, c. 46.)

§ 95-4. Authority, powers and duties of Commissioner. — The Commissioner of Labor shall be the executive and administrative head of the Department of Labor. In addition to the other powers and duties conferred upon the Commissioner of Labor by this article, the said Commissioner shall have

authority and be charged with the duty:

(a) To appoint and assign to duty such clerks, stenographers, and other employees in the various divisions of the Department, with approval of said director of division, as may be necessary to perform the work of the Department, and fix their compensation, subject to the approval of the Budget Bureau. The Commissioner of Labor may assign or transfer stenographers, or clerks, from one division to another, or inspectors from one division to another, or combine the clerical force of two or more divisions, or require from one di-

vision assistance in the work of another division, as he may consider necessary and advisable: Provided, however, the provisions of this subsection shall not apply to the Industrial Commission, or the Division of Workmen's Compensation.

(b) To make such rules and regulations with reference to the work of the Department and of the several divisions thereof as shall be necessary to properly carry out the duties imposed upon the said Commissioner and the work of the Department; such rules and regulations to be made subject to the approval of the Governor.

(c) To take and preserve testimony, examine witnesses, administer oaths, and under proper restriction enter any public institution of the State, any factory, store, workshop, laundry, public eating house or mine, and interrogate any person employed therein or connected therewith, or the proper officer of a corporation, or file a written or printed list of interrogatories and require full and complete answers to the same, to be returned under oath within thirty days of the receipt of said list of questions.

(d) To secure the enforcement of all laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State. To aid him in the work, he shall have power to appoint factory inspectors and other assistants. The duties of such inspectors and other assistants shall be prescribed by the Commissioner of Labor.

(e) To visit and inspect, personally or through his assistants and factory inspectors, at reasonable hours, as often as practicable, the factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State, where goods, wares, or merchandise are manufactured, purchased, or

sold, at wholesale or retail.

(f) To enforce the provisions of this section and to prosecute all violations of laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating houses, and commercial institutions in this State before any justice of the peace or court of competent jurisdiction. It shall be the duty of the solicitor of the proper district or the prosecuting attorney of any city or county court, upon the request of the Commissioner of Labor, or any of his assistants or deputies, to prosecute any violation of a law, which it is made the duty of the said Commissioner of Labor to enforce. (1925, c. 288; 1931, c. 277; c. 312, ss. 5, 6; 1933, cc. 46, 244; 1945, c. 723, s. 2.)

Editor's Note.— The 1933 amendment added subsections (c), (d), (e), and (f) of this section as they now appear. See 11 N. C. Law Rev. 234.

The 1945 amendment struck out former subsection (f), authorizing the Commissioner "to aid veterans of the World War in securing adjustment of claims against the federal government," and relettered former subsection (g) as subsection (f). Section 4 of the amendatory act provided that it should become effective as of the date upon which the Governor effects the transfer of veterans' activities in compliance with § 165-11.

- § 95-5. Annual report to Governor; recommendation as to legislation needed.—The Commissioner of Labor shall annually, on or before the first day of January, file with the Governor a report covering the activities of the Department, and the report so made on or before January first of the years in which the General Assembly shall be in session shall be accompanied by recommendations of the Commissioner with reference to such changes in the law applying to or affecting industrial and labor conditions as the Commissioner may deem advisable. The report of the Commissioner of Labor shall be printed and distributed in such manner and form as the Director of the Budget shall authorize. (1931, c. 312, s. 7.)
- § 95-6. Statistical report to Governor; publication of information given by employers.—It shall be the duty of the Commissioner of Labor to collect in the manner herein provided for, and to assort, systematize, and present to the Governor as a part of the report provided for in § 95-5, statistical

details relating to all divisions of labor in the State, and particularly concerning the following: The extent of unemployment, the hours of labor, the number of employees and sex thereof, and the daily wages earned; the conditions with respect to labor in all manufacturing establishments, hotels, stores, and workshops; and the industrial, social, educational, moral, and sanitary conditions of the labor classes, in the productive industries of the State. Such statistical details shall include the names of firms, companies, or corporations, where the same are located, the kind of goods produced or manufactured, the period of operation of each year, the number of employees, male or female, the number engaged in clerical work and the number engaged in manual labor, with the classification of the number of each sex engaged in such occupation and the average daily wage paid each: Provided, that the Commissioner shall not, nor shall anyone connected with his office, publish or give or permit to be published or given to any person the individual statistics obtained from any employer, and all such statistics, when published, shall be published in connection with other similar statistics and be set forth in aggregates and averages. (1931, c. 312, s. 8.)

- § 95-7. Power of Commissioner to compel the giving of such information; refusal as contempt.—The Commissioner of Labor, or his authorized representative, for the purpose of securing the statistical details referred to in § 95-6, shall have power to examine witnesses on oath, to compel the attendance of witnesses and the giving of such testimony and production of such papers as shall be necessary to enable him to gain the necessary information. Upon the refusal of any witness to comply with the requirements of the Commissioner of Labor or his representative in this respect, it shall be the duty of any judge of the superior court, upon the application of the Commissioner of Labor, or his representative, to order the witness to show cause why he should not comply with the requirements of the said Commissioner, or his representative, if in the discretion of the judge such requirement is reasonable and proper. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 9.)
- § 95-8. Employers required to make statistical report to Commissioner; refusal as contempt.—It shall be the duty of every owner, operator, or manager of every factory, workshop, mill, mine, or other establishment, where labor is employed, to make to the Department, upon blanks furnished by said Department, such reports and returns as the said Department may require, for the purpose of compiling such labor statistics as are authorized by this article, and the owner or business manager shall make such reports and returns within the time prescribed therefor by said Commissioner, and shall certify to the correctness of the same. Upon the refusal of any person, firm, or corporation to comply with the provisions of this section, it shall be the duty of any judge of the superior court, upon application by the Commissioner or by any representative of the Department authorized by him, to order the person, firm, or corporation to show cause why he or it should not comply with the provisions of this section. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 10.)
- § 95-9. Employers to post notice of laws.—It shall be the duty of every employer to keep posted in a conspicuous place in every room where five or more persons are employed a printed notice stating the provisions of the law relative to the employment of adult persons and children and the regulation of hours and working conditions. The Commissioner of Labor shall furnish the printed form of such notice upon request. (1933, c. 244, s. 6.)
- § 95-10. Division of Workmen's Compensation.—The North Carolina Industrial Commission, created under the provisions of the Workmen's Compensation Act, § 97-1 et seq., is hereby transferred to the Department of Labor as

one of its integral units. The powers, duties, and personnel of the said Industrial Commission shall continue as provided for in the Workmen's Compensation Act: Provided, however, that such adjustments shall be made in connection with the statistical work and the work of inspection of said Industrial Commission and the statistical work and work of inspection of other divisions of the Department of Labor as the Commissioner of Labor, with the advice of the Industrial Commission and of the heads of the divisions directly concerned, may, with the approval of the Governor, prescribe, for the purpose of facilitating, expediting, and improving the work of the Department as a whole. (1931, c. 312, s. 11.)

- § 95-11. Division of Standards and Inspection.—(a) The chief administrative officer of the Division of Standards and Inspection shall be known as the Director of the Division. It shall be his duty, under the direction and supervision of the Commmissioner of Labor, and under rules and regulations to be adopted by the Department as herein provided, to make or cause to be made all necessary inspections to see that all laws, rules, and regulations concerning the safety and well-being of labor are promptly and effectively carried out.
- (b) The Division shall make studies and investigations of special problems connected with the labor of women and children, and create the necessary organization, and appoint an adequate number of investigators, with the consent of the Commissioner of Labor and the approval of the Governor; and the Director of said Division, under the supervision and direction of the Commissioner of Labor and under such rules and regulations as shall be prescribed by said Commissioner, with the approval of the Governor, shall perform all duties devolving upon the Department of Labor, or the Commissioner of Labor with relation to the enforcement of laws, rules, and regulations governing the employment of women and children.

(c) The Director shall report annually to the Commissioner of Labor the activities of the Division, with such recommendations as may be considered advisable for the improvement of the working conditions for women and children.

- (d) The Division shall collect and collate information and statistics concerning the location, estimated and actual horsepower and condition of valuable water powers, developed and undeveloped, in this State; also concerning farm lands and farming, the kinds, character, and quantity of the annual farm products in this State; also of timber lands and timbers, truck gardening, dairying, and such other information and statistics concerning the agricultural and industrial welfare of the citizens of this State as may be deemed to be of interest and benefit to the public. The Director shall also perform the duties of mine inspector as prescribed in the chapter on Mines and Quarries.
- (e) The Division shall conduct such research and carry out such studies as will contribute to the health, safety, and general well-being of the working classes of the State. The finding of such investigations, with the approval of the Commissioner of Labor and the Governor and the co-operation of the chief administrative officer of the Division or Divisions directly concerned, shall be promulgated as rules and regulations governing work places and working conditions. All recommendations and suggestions pertaining to health, safety, and well-being of employees shall be transmitted to the Commissioner of Labor in an annual report which shall cover the work of the Division of Standards and Inspection.

(f) The Division shall make, promulgate and enforce rules and regulations for the protection of employees from accident and from occupational disease; and shall upon request, and after such investigation as it deems proper, issue certificates of compliance to such employers as are found by it to be in compliance with the rules and regulations made and promulgated in accordance with the provisions of this paragraph. (1931, c. 312, s. 12; c. 426; 1935, c. 131.)

Editor's Note. — Subsection (f) was added by the 1935 amendment.

- § 95-12. Division of Statistics.—The Division of Statistics shall be in charge of a Chief Statistician. It shall be his duty, under the direction and supervision of the Commissioner of Labor, to collect, assort, systematize, and print all statistical details relating to all divisions of labor in this State as is provided in § 95-6. (1931, c. 312, s. 13.)
- § 95-13. Enforcement of rules and regulations.—In the event any person, firm or corporation shall, after notice by the Commissioner of Labor, violate any of the rules or regulations promulgated under the authority of this article or any laws amendatory hereof relating to safety devices, or measures, the Attorney General of the State, upon the request of the Commissioner of Labor, may take appropriate action in the civil courts of the State to enforce such rules and regulations. Upon request of the Attorney General, any solicitor of the State of North Carolina in whose district such rule or regulation is violated may perform the duties hereinabove required of the Attorney General. (1939, c. 398.)
- § 95-14. Agreements with certain federal agencies for enforcement of Fair Labor Standards Act .- The North Carolina State Department of Labor may and it is hereby authorized to enter into agreements with the Wage and Hour Division, and the Children's Bureau, United States Department of Labor, for assistance and co-operation in the enforcement within this State of the act of Congress known as the Fair Labor Standards Act of one thousand nine hundred thirty-eight, approved June twenty-fifth, one thousand nine hundred thirty-eight, and is further authorized to accept payment and/or reimbursement for its services as provided by said act of Congress. Any such agreement may be subject to the regulations of the administrator of the Wage and Hour Division, or the chief of the Children's Bureau of the United States Department of Labor, as the case may be, and shall be subject to the approval of the Director of the State Budget. Nothing in this section shall be construed as authorizing the State Department of Labor to spend in excess of its appropriation from State funds, except to the extent that such excess may be paid and/or reimbursed to it by the United States Department of Labor. All payments received by the State Department of Labor under this section shall be deposited in the State treasury and are hereby appropriated to the State Department of Labor to enable it to carry out the agreements entered into under this section. (1939, c. 245.)

ARTICLE 2.

Maximum Working Hours.

- § 95-15. Title of article.—This article shall be known and may be cited as the "Maximum Hour Law." (1937, c. 409, s. 1.)
- § 95-16. Declaration of public policy; enactment under police power.—As a guide to interpretation and application of this article, the public policy of this State is declared as follows: The relationship of hours of labor to the health, morals and general welfare of the people is a subject of general concern which requires appropriate legislation to limit hours of labor to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry.

The General Assembly, therefore, declares that in its considered judgment the general welfare of the State requires enactment of this law under the police power

of the State. (1937, c. 409, s. 2.)

§ 95-17. Limitations of hours of employment; exceptions.—No employer shall employ a female person for more than forty-eight hours in any one

week or nine hours in any one day, or on more than six days in any period of seven consecutive days.

No employer shall employ a male person for more than fifty-six hours in any one week, or more than twelve days in any period of fourteen consecutive days or more than ten hours in any one day, except that in case where two or more shifts of eight hours each or less per day are employed, any shift employee may be employed not to exceed double his regular shift hours in any one day whenever a fellow employee in like work is prevented from working because of illness or other cause: Provided, that any male person employed working in excess of fiftyfive hours in any one week shall be paid time and a half at his regular rate of pay for such excess hours: Provided, in case of emergencies, repair crews, engineers, electricians, firemen, watchmen, office and supervisory employees and employees engaged in hereinafter defined continuous process operations and in work, the nature of which prevents second shift operations, may be employed for not more than sixty hours in any one week: Provided, also, that the ten hours per day maximum shall not apply to any employee when his employment is required for a longer period on account of an emergency due to breakdown, installation or alteration of equipment: Provided, also, that the ten hours per day maximum shall not apply to any employee who is employed as a motor vehicle mechanic on a commission, or who is employed partly on commission and partly on wage or salary basis: Provided, that boys over fourteen years of age delivering newspapers on fixed routes and working not more than twenty-four hours per week, and watchmen may be employed seven days per week: Provided, further, that from the eighteenth of December to and including the following twenty-fourth of December and for two periods of one week's duration each during the year for purpose of taking inventory, female persons over sixteen years of age in mercantile establishments may be employed not to exceed ten hours in any one day: Provided, further, that female persons engaged in the operation of seasonal industries in the process of conditioning and preserving perishable or semiperishable commodities may be employed for not more than ten hours in any one day and not more than fifty-five hours in any one week.

No provision in this article shall be deemed to authorize the employment of any minor in violation of the provisions of any law expressly regulating the hours of labor of minors or of any regulations made in pursuance of such laws.

Where the day is divided into two or more work periods for the same employee, the employer shall provide that all such periods shall be within twelve consecutive hours, except that in the case of employees of motion picture theatres, restaurants, dining rooms, and public eating places, such periods shall be within fourteen consecutive hours:

Provided, that the transportation of employees to and from work shall not

constitute any part of the employees' work hours.

Nothing in this section or any other provisions of this article shall apply to the employment of persons in agricultural occupations, ice plants, cotton gins and cottonseed oil mills or in domestic service in private homes and boarding houses, or to the work of persons over eighteen years of age in bona fide office, foremanship, clerical or supervisory capacity, executive positions, learned professions, commercial travelers, motion picture theatres, seasonal hotels and club houses, commercial fishing or tobacco redrying plants, tobacco warehouses, employers employing a total of not more than eight persons in each place of business, charitable institutions and hospitals: Provided further, that nothing in this section or in any other provision of this article shall apply to railroads, common carriers and public utilities subject to the jurisdiction of the Interstate Commerce Commission or the North Carolina Utilities Commission, and utilities operated by municipalities or any transportation agencies now regulated by the federal government: Provided, further, that the limitation on daily and weekly hours provided for in this section shall not apply to any male employee eighteen

years of age and over whose employment is covered by or in compliance with the Fair Labor Standards Act of 1938 (Public No. 718; 75th Congress; Chapter 676-3rd Session), as amended or as same may be amended: Provided, nothing in this article shall apply to the State or to municipal corporations or their em-

ployees, or to employees in hotels.

When, by reason of a seasonal rush of business, any employer finds or believes it to be necessary that the employees of his or its manufacturing plant shall work for more than fifty-six hours per week, the employer may apply to the Commissioner of Labor of the State of North Carolina for permission to allow the employees of such establishment to work a greater number of hours than fiftysix for a definite length of time not exceeding sixty days; and the Commissioner after investigation, may, in his discretion, issue such permit on the condition that all such employees shall receive one and one-half times the usual compensation for all hours worked over fifty-six per week: Provided, this shall not apply to the hours of any female person or any person under the age of eighteen years: Provided further, employees in all laundries and dry cleaning establishments shall not be employed more than fifty-five hours in any one week: Provided further, nothing contained in this article shall be construed to limit the hours of employment of any outside salesmen on commission basis. Provided, that this article shall not apply to male clerks in mercantile establishments. Provided, that this article shall not apply to retail or wholesale florists nor to employees of retail or wholesale florists during the following periods of each year: one week prior to and including Easter, one week prior to and including Christmas, and one week prior to and including Mother's Day. (1937, c. 406; c. 409, s. 3; 1939, c. 312, s. 1; 1943, c. 59; 1947, c. 825; 1949, c. 1057.)

Cross Reference. — Compare §§ 95-26,

95-27.

Editor's Note. — The 1939 amendment added the last proviso in the section.

The 1943 amendment substituted "fifty-six" for "fifty-five" near the beginning of the second paragraph and in three places in the last paragraph. It also inserted the

first proviso in the second paragraph.

The 1947 amendment inserted the second proviso in the sixth paragraph. The 1949 amendment inserted the fourth proviso in the second paragraph.

For discussion of the 1947 amendment,

see 25 N. C. Law Rev. 449.

§ 95-18. Definitions.—Whenever used in this article

(a) "Employ" includes permit or suffer to work.

(b) "Employer" includes every person, firm, corporation, partnership, stock association, agent, manager, representative or foreman, or other person having control or custody of any employment, place of employment or of any employee.

(c) "Day" includes any period of twenty-four consecutive hours.

- (d) "Continuous process operations" includes bleaching, dyeing, finishing, redrying, dry kiln operations, and any other processing requiring continuous handling or work for completion. (1937, c. 409, s. 4.)
- § 95-19. Posting of law.—Every employer shall post and keep conspicuously posted in or about the premises wherein any employee is employed, a printed abstract of this article to be furnished by the State Commissioner of Labor upon request. (1937, c. 409, s. 5.)
- § 95-20. Time records kept by employers.—Every employer shall keep a time book and/or record which shall state the name and occupation of each employee employed and which shall indicate the number of hours worked by him or her on each day of the week, and the amount of wages paid each pay period to each such employee. Such time book and/or record shall be kept on file at least one year after the entry of the record. The State Commissioner of Labor or his duly authorized representative shall, for the purpose of examination, have access to and the right to copy from such time book and/or record for the purpose of prosecuting violations of the provisions of the article. Any employer

who fails to keep such time book and/or record, or knowingly and intentionally makes any false statement therein, or refuses to make such time book and/or record accessible, upon request, to the State Commissioner of Labor or his duly authorized representative shall be deemed to have violated this section. (1937, c. 409, s. 6.)

- § 95-21. Enforcement by Commissioner of Labor.—It shall be the duty of the State Commissioner of Labor to enforce all the provisions of this article. The State Commissioner of Labor and his authorized representatives shall have the power and authority to enter any place of employment, and, in the enforcement of this article, the State Commissioner of Labor and his authorized representatives may enter and inspect as often as practicable all such places of employment. They may investigate all complaints of violations of this article received by them, and may institute prosecutions as hereinafter provided for violations of this article. (1937, c. 409, s. 7.)
- § 95-22. Interference with enforcement prohibited.—No person shall hinder or delay the State Commissioner of Labor or any of his authorized representatives in the performance of his duties; nor shall any person refuse to admit to, or lock out from, any place of employment the State Commissioner of Labor or any of his authorized representatives, or refuse to give the State Commissioner of Labor or his authorized representatives information required for the proper enforcement of this article. (1937, c. 409, s. 8.)
- § 95-23. Violation a misdemeanor.—Any person who, whether on his own behalf or for another, or through an agent, manager, representative, foreman or other person, shall knowingly and intentionally violate any provisions of this article, shall be guilty of a misdemeanor. (1937, c. 409, s. 9.)
- § 95-24. Penalties. Whoever knowingly and intentionally violates any provisions of § 95-17, upon complaint lodged by the State Commissioner of Labor, shall be punished by a fine of not less than ten (\$10.00) dollars nor more than fifty (\$50.00) dollars, or by imprisonment for not more than thirty days in the discretion of the court; and whenever any person shall have been notified by the State Commissioner of Labor or his authorized representative, or by the service of a summons in a prosecution, that he is violating such provision, he shall be subject to like penalties in addition for each and every day that such violation shall have been continued after such notification.

Whoever knowingly and intentionally violates any of the provisions of §§ 95-19, 95-20, or 95-22 of this article shall be punished, for the first offense, by a fine of not less than five (\$5.00) dollars nor more than twenty-five (\$25.00) dollars, or imprisonment for not more than thirty days, in the discretion of the court, and whenever any person shall have been notified by the State Commissioner of Labor or his authorized representative that he is violating such provisions, and shall have been given a reasonable time in which to remedy the conditions which shall constitute such violations, he shall be subject to like penalties in addition to the penalties aforesaid, for each and every day that such violation shall have continued after the expiration of the time allowed by the State Commissioner of Labor or his authorized representative for remedying the aforesaid conditions. (1937, c. 409, s. 10.)

§ 95-25. Intimidating witnesses. — Whoever shall, by force, intimidation, threat of procuring dismissal from employment, or by any other manner whatsoever, induce or attempt to induce an employee to refrain from giving testimony in any investigation or proceeding relating to or arising under this article, or whoever discharges or penalizes any employee for so testifying, shall be subject to a fine of not less than ten (\$10.00) dollars nor more than fifty (\$50.00) dollars, or by imprisonment for not more than thirty days. (1937, c. 409, s. 11.)

ARTICLE 3.

Various Regulations.

§ 95-26. Week's work of women to be fifty-five hours.-Not more than fifty-five hours shall constitute a week's work for women over sixteen in any laundry, dry-cleaning establishment, pressing club, work shop, factory, manufacturing establishment, or mill, of the State, and no woman over sixteen employed in any of the above-named places shall be worked exceeding eleven hours in any one day or over fifty-five hours in any one week. Any employer of labor violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. and each day's work exceeding the said hours shall constitute a separate oifense. Provided, that this section shall not apply to those employed in the operation of seasonal industries in their process of conditioning and of preserving perishable or semiperishable commodities, or to those engaged in agricultural work. Provided, further, that this section shall not apply to retail or wholesale florists nor to employees of retail or wholesale florists during the following periods of each year: one week prior to and including Easter, one week prior to and including Christmas, and one week prior to and including Mother's Day. (1915, c. 148, s. 2; C. S., s. 6554; 1931, c. 289; 1935, c. 406; 1939, c. 312, s. 2.)

Cross Reference.—For hours law applicable to employers hiring nine or more em-

ployees, see §§ 95-15 to 95-25.

Editor's Note.—The 1931 amendment struck out the former section, which provided a sixty-hour week for men and women, permitting the men to exceed it under special contract for overtime, and

substituted a section making no provision for male workers.

The 1935 amendment made this section applicable to laundries, dry-cleaning establishments, pressing clubs and workshops.

The 1939 amendment added the second

proviso.

§ 95-27. Hours of work for women in certain industries.—It shall be unlawful for any person, firm, or corporation, proprietor or owner of any retail, or wholesale mercantile establishment or other business where any female help is employed for the purpose of serving the public in the capacity of clerks, salesladies or waitresses and other employees of public cating places, to employ or permit to work any female longer than ten hours in any one day or over fifty-five hours in any one week; nor shall any female be employed or permitted to work for more than six hours continuously at any one time without an interval of at least half an hour except where the terms of employment do not call for more than six and a half hours in any one day or period.

Nothing in this section shall be construed to apply to females whose full time is employed as bookkeepers, cashiers or office assistants or to any establishment that does not have in its employment three or more persons at any one time.

Every employer shall post in a conspicuous place in every room of the establishment in which females are employed a printed notice stating the provisions of this section and the hours of labor. The printed form of such notice shall be furnished, upon request, by the Commissioner of Labor.

Any employer of labor violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars or imprisoned not exceeding sixty days and each day's work exceeding the said hours shall constitute a separate offense. (1933, c. 35; 1935, c. 407.)

Cross Reference.—For hours law applicable to employers hiring nine or more employees, see §§ 95-15 to 95-25.

Editor's Note. — The 1935 amendment omitted a proviso, which formerly ap-

peared in the second paragraph, stating that the section should not apply to establishments in towns of less than five thousand inhabitants.

§ 95-28. Working hours of employees in State institutions.—It shall be unlawful for any person or official or foreman or other person in authority

in the State hospital at Raleigh, the State hospital at Morganton, the State hospital at Goldsboro, or any penal or correctional institution of the State of North Carolina, excepting the State prison and institutions under the control of the State Commission of Highways and Public Works, to require any employee to work for a greater number of hours than twelve (12) during any twenty-four (24) hour period, or not more than eighty-four (84) hours during any one week, or permit the same, during which period the said employee shall be permitted to take one continuous hour off duty; except in case of an emergency as determined by the superintendent, in which case the limitation of twelve (12) hours in any consecutive twenty-four (24) shall not apply. Nothing in this section shall be construed to affect the hours of doctors and superintendents in these hospitals. Any violation of this section shall be a misdemeanor, punishable within the discretion of the court. (1935, c. 136.)

§ 95-29. Seats for women employees; failure to provide, a misdemeanor.—All persons, firms, or corporations who employ females in a store, shop, office, or manufacturing establishment, as clerks, operatives, or helpers in any business, trade, or occupation carried on or operated in the State of North Carolina, shall be required to procure and provide proper and suitable seats for all such females, and shall permit the use of such seats, rests, or stools as may be necessary, and shall not make any rules, regulations, or orders preventing the use of such seats, stools, or rests when any such female employee or employees are not actively employed or engaged in their work in such business or employment.

If any employer of female help fails to provide seats, as required in this article, or makes any rules, orders or regulations in his or its shop, store, or other place of business requiring females to remain standing when not necessarily employed or engaged in service or labor therein, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by fine or imprisonment, or both, within the discretion of the court.

The Commissioner of Labor, or his duly authorized agents, may at any time enter and inspect all stores, shops, offices, or manufacturing or other establishments coming within the provisions of this section, and he may make such rules and regulations as he deems necessary to enforce the provisions of this section. It shall be unlawful for any person, firm or corporation to refuse permission to enter, obstruct, or prevent any duly authorized agent of the Commissioner in his effort to make the inspection herein provided for. (1909, c. 857, ss. 1, 2; 1919, c. 100, s. 12; C. S., s. 6555.)

§ 95-30. Medical chests in factories; failure to provide, a misdemeanor. — Every person, firm, or corporation operating a factory or shop employing over twenty-five laborers, in which machinery is used for any manufacturing purpose, or for any purpose except for elevation or for heating or hoisting apparatus, shall at all times keep and maintain free of expense to the employees a medical or surgical chest which shall contain two porcelain pans, two tourniquets, gauze, absorbent cotton, adhesive plasters, bandages, antiseptic soap, one bottle of carbolic acid with directions on bottle, one bottle antiseptic tablets, one pair scissors, one folding stretcher, for the treatment of persons injured or taken ill upon the premises: Provided, this section does not require any employer to spend over ten dollars for such equipment.

Any person, firm, or corporation violating this section shall be subject to a fine not less than five dollars nor more than twenty-five dollars for every week

during which such violation continues. (1911, c. 57; C. S., s. 6556.)

§ 95-31. Acceptance by employer of assignment of wages.—No employer of labor shall be responsible for any assignment of wages to be earned in the future, executed by an employee, unless and until such assignment of

wages is accepted by the employer in a written agreement to pay same. c. 410; 1937, c. 90.)

Editor's Note. - The 1937 amendment struck out a proviso exempting Cabarrus, Iredell, Rockingham and Rowan counties from the provisions of this section.

Section Is Constitutional. - The provisions of this section, rendering an assignment invalid unless accepted in writing by the employer, do not deprive the assignee of due process of law or the equal protection of the laws. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733 (1941).

When applied to contracts executed after its effective date this section cannot be held unconstitutional as impairing the obligations of contracts. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L.

R. 733 (1941).

This section is a regulation of contracts growing out of the relationship of employer and employee imposed for the general welfare and is a valid exercise of the police power of the State. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733 (1941).

The fact that this section permits an employer, at his election to accept an assignment of unearned wages executed by his employee does not in itself constitute an unconstitutional discrimination, since in the absence of legislative restraint, one engaged in private business may exercise his own pleasure as to the parties with whom he will deal. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733 (1941).

Purpose.-The end in view was not only to relieve the employer of unnecessary responsibility, but also to restrain the activities of those who were engaged in the business of buying at a discount the unearned wages of employees. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d)

115, 137 A. L. R. 733 (1941).

Section Applies Only to Wages to Be Earned. - An assignment by an employee of wages earned and due him from the employer is valid without acceptance by the employer, and the assignee may sue the employer thereon, the provision of this section being applicable only to wages to be earned in the future. Rickman v. Holshouser, 217 N. C. 377, 8 S. E. (2d) 199 (1940).

ARTICLE 4.

Conciliation Service and Mediation of Labor Disputes.

§ 95-32. Declaration of policy.—It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the State, while not direct parties thereto, should always be considered, respected and protected; and that the conciliation and voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the State. To carry out such policy, the necessity for the enactment of the provisions of this article is hereby declared as a matter of legislative determination. (1941, c. 362, s. 1.)

Cross Reference.—For subsequent statute affecting this article, see §§ 95-36.1 to 95-36.7.

- § 95-33. Scope of article.—The provisions of this article shall apply to all labor disputes in North Carolina. (1941, c. 362, s. 2.)
- § 95-34. Administration of article.—The administration of this article shall be under the general supervision of the Commissioner of Labor of North · Carolina. (1941, c. 362, s. 3.)
 - § 95-35. Conciliation service established; personnel; removal; compensation. — There is hereby established in the Department of Labor a con-

ciliation service. The Commissioner of Labor may appoint such employees as may be required for the consummation of the work under this article, prescribe their duties and fix their compensation, subject to existing laws applicable to the appointment and compensation of employees of the State of North Carolina. Any member of or employee in the conciliation service may be removed from office by the Commissioner of Labor, acting in his discretion. (1941, c. 362, s. 4.)

§ 95-36. Powers and duties of Commissioner and conciliator.—Upon his own motion in an existent or imminent labor dispute, the Commissioner of Labor may, and, upon the direction of the Governor, must order a conciliator to take such steps as seem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between employer and employees which have precipitated or culminated in or threaten to precipitate or culminate in such labor dispute.

The conciliator shall promptly put himself in communication with the parties to such controversy, and shall use his best efforts, by mediation, to bring them to

agreement.

The Commissioner of Labor, any conciliator or conciliators and all other employees of the Commissioner of Labor engaged in the enforcement and duties prescribed by this article, shall not be compelled to disclose to any administrative or judicial tribunal any information relating to, or acquired in the course of their official activities under the provisions of this article, nor shall any reports, minutes, written communications, or other documents or copies of documents of the Commissioner of Labor and the above employees pertaining to such information be subject to subpoena: Provided, that the Commissioner of Labor, any conciliator or conciliators and all other employees of the Commissioner of Labor engaged in the enforcement of this article, may be required to testify fully in any examination, trial, or other proceeding in which the commission of a crime is the subject of inquiry. (1941, c. 362, s. 5; 1949, c. 673.)

Editor's Note. — The 1949 amendment ment on the amendment, see 27 N. C. Law added the last paragraph. For brief com-

ARTICLE 4A.

Arbitration Service for Voluntary Arbitration of Labor Disputes.

- § 95-36.1. Declaration of policy.—It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the State, while not direct parties thereto, should always be considered, respected and protected; and where amicable settlement by concilitation and/or mediation have been unsuccessful that the voluntary arbitration of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the State. To carry out such policy, the necessity for the enactment of the provisions of this article is hereby declared as a matter of legislative determination. (1945, c. 1045, s. 1.)
- § 95-36.2. Scope of article.—The provisions of this article shall apply to labor disputes pertaining to wages, hours and working conditions in North Carolina when parties wish to avail themselves of arbitration under this article. (1945, c. 1045, s. 2.)
 - § 95-36.3. Administration of article. The administration of this

article shall be under the general supervision of the Commissioner of Labor of North Carolina. (1945, c. 1045, s. 3.)

- § 95-36.4. Arbitration service established; personnel; removal; compensation.—There is hereby established in the Department of Labor an arbitration service. The Commissioner of Labor may appoint such employees as may be required for the consummation of the work under this article, prescribe their duties and fix their compensation, subject to existing laws applicable to the appointment and compensation of employees of the State of North Carolina. Any member of or employee in the arbitration service may be removed from office by the Commissioner of Labor, acting in his discretion. (1945, c. 1045, s. 4.)
- § 95-36.5. Arbitration.—(a) Submission of Controversy to Arbitration Panel.—Whenever a controversy pertaining to wages, hours and working conditions shall arise between employees and employer and where amicable settlement by conciliation and/or mediation has been unsuccessful such controversy may, by agreement of the parties thereto, be submitted to an arbitration panel of three persons, or should the parties so desire a single arbitrator appointed by the Commissioner of Labor as provided for in subsection (b); provided, however, that the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this article or otherwise.
- (b) Manner of Selecting Arbitration Panel or Arbitrator.—Such panel or arbitrator shall be chosen in the following manner: In case a panel is desired, the employer shall designate one arbitrator, the union or other representative of the employees shall designate one arbitrator, and they by agreement shall select the third arbitrator, who shall serve as chairman of the panel. If they are unable, within a reasonable time, to agree upon such third arbitrator, he may, upon the request of the parties to the dispute, be appointed by the Commissioner of Labor. Should the parties prefer to submit the dispute to a single arbitrator, and be unable within a reasonable time, to agree upon such an arbitrator, he may, upon the request of the parties to the dispute, be appointed by the Commissioner of Labor. All appointments of third and single arbitrators by the Commissioner of Labor shall be made from the list of qualified arbitrators maintained by him. It shall be the duty of the Commissioner of Labor to maintain a list of qualified and public spirited citizens who will serve as arbitrators. The third arbitrator, when appointed by the Commissioner, may be paid, within the discretion of the Commissioner, per diem compensation, at the rate established by the Commissioner of Labor, and actual travel and necessary expenses incurred while performing duties arising under this article. Necessary stenographic, clerical and technical service and assistance to the panel or arbitrator, in those cases wherein an arbitrator has been named by the Commissioner of Labor, shall be furnished by the Department of Labor. Expenditures provided for under this section shall be paid from funds appropriated for the administration of this article.
- (c) Arbitration Procedure; Witnesses; and Award.—The submission of the dispute to the arbitration panel or arbitrator shall be in writing, signed by the parties or their authorized agents, and shall contain a statement of the issues or questions in dispute and an agreement to continue in business or at work without a lockout or strike during the arbitration and to abide by the arbitration award. Upon such submission, the panel or arbitrator shall examine the matter in controversy, and, after reasonable notice, afford the parties an opportunity to be heard and to examine and cross-examine witnesses. The arbitrator or panel, or a majority of them, may require any person to attend before him or them as a witness and to bring with him any book or writing or other evidence. Subpoenas shall issue in the name of the arbitrator or panel, or a majority of them, and shall be directed to the person and shall be served in the same manner as subpoenas to testify before a court of record in this State; if any persons so summoned to testify shall refuse or neglect to obey such subpoenas, upon petition the superior

court may compel the attendance of such person before the arbitrator or panel, or punish such persons for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the courts of this State. A written report of the panel's or arbitrator's findings of fact and recommendations shall be made to each party to the controversy; where the Commissioner of Labor has appointed an arbitrator, such reports shall be made within thirty (30) days after the selection of the arbitrator, unless this period of time shall be extended by agreement of the parties or by the Commissioner of Labor for good and sufficient reasons. If any panel is unable to reach a unanimous decision on the merits of any issue, the finding and decision of a majority of the members of the panel shall constitute the award of the panel on that issue; if a majority vote cannot be obtained on any issue, the finding and decision of the chairman shall constitute the award of the panel on that issue. Arbitration proceedings under this article shall be filed with the Commissioner of Labor, who may make a public report. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3.)

Editor's Note. — The 1947 amendment substituted "three" for "five" near the middle of subsection (a) and substituted "a single" for "an" in the next line. It also

rewrote subsection (b) and inserted the next to last sentence of subsection (c). For discussion of the amendment, see 25 N. C. Law Rev. 446.

§ 95-36.6. Disqualification.—No person named by the Commissioner of Labor to act as an arbitrator in a dispute which has been submitted to arbitration shall be qualified to serve as such arbitrator if such person has any financial or other interest in the company or union involved in the dispute. (1945, c. 1045, s. 6; 1947, c. 379, s. 4.)

Editor's Note.—The 1947 amendment For discussion of the amendment, see 25 rewrote the latter part of this section. N. C. Law Rev. 446.

§ 95-36.7. Rules.—The Commissioner of Labor with the written approval of the Attorney General shall have power to adopt, alter, amend or repeal such rules in connection with the voluntary arbitration of labor disputes as may be necessary for the proper administration and enforcement of the provisions of this article. (1945, c. 1045, s. 7.)

ARTICLE 5.

Regulation of Employment Agencies.

- § 95-37. Employment agency defined.—Employment agency within the meaning of this article shall include any business operated by any person, firm or corporation for profit and engaged in procuring employment for any person, firm or corporation in the State of North Carolina and making a charge on the employee or employer for the service. (1929, c. 178, s. 1.)
- § 95-38. License from Commissioner of Labor; investigation of applicant.—No person, firm or corporation shall engage in the business of operating any employment agency, as designated in § 95-37, in North Carolina without first making a written application to the Commissioner of Labor and being licensed by him as herein provided, to engage in such business. Upon receiving an application from such person, firm or corporation it shall be the duty of the Commissioner of Labor to make an investigation into the character and moral standing of the person, firm or corporation. If after such investigation, the Commissioner of Labor shall be satisfied that such person, firm or corporation is of such character and moral standing as to warrant the issuance of a license to engage in the business covered by this article, he shall issue a license to such person, firm or corporation as provided herein. (1929, c. 178, s. 2; 1931, c. 312, s. 3.)
- § 95-39. Rules and regulations governing issuance of licenses.— The Commissioner of Labor is authorized and empowered to make general rules

and regulations in relation to the licensing of such employment agencies and for the general supervision thereof in accordance with this article. (1929, c. 178, s. 3; 1931, c. 312, s. 3.)

- § 95-40. Investigation of records of agencies; hearing; rescission of licenses.—The Commissioner of Labor may investigate the books and records of any employment agency licensed under this article, and may rescind the license of the agency for cause if he finds that the agency is not complying with the terms and conditions of this article. No license shall be revoked until the Commissioner shall hold a hearing at the courthouse of the county in which the licensee is doing business. The licensee shall be given ten days' notice to appear at the hearing and show cause why the license should not be revoked. At the hearing the result of the Commissioner's investigation shall be presented under oath, and the licensee may present evidence to show that the license should not be revoked. The licensee may appeal to the superior court within ten days after the Commissioner's decision. (1929, c. 178, s. 4; 1931, c. 312, s. 3.)
- § 95-41. Subpoenas; oaths.—The Commissioner of Labor, his assistant or deputy shall be empowered to subpoena witnesses and administer oaths in making investigations and taking testimony to be presented at the hearing to be held before the Commissioner of Labor as hereinbefore provided for. (1929, c. 178. s. 5; 1931, c. 312, s. 3.)
- § 95-42. Service of subpoenas and fees for, governed by general law.—The county sheriffs and their respective deputies shall serve all subpoenas of the Commissioner of Labor, and shall receive the same fees as are now provided by law for like services, and each witness who appears in obedience to such subpoena shall receive for attendance the fees and mileage for witnesses in civil cases of courts of the county in which the hearing is held. (1929, c. 178, s. 6; 1931, c. 312, s. 3.)
- § 95-43. Production of books, papers and records. The superior court shall, on the application of the Commissioner of Labor, his assistant or duly authorized deputy, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records. (1929, c. 178, s. 7; 1931, c. 312, s. 3.)
- § 95-44. License fee to be paid into special fund. The license fee, charged under the provisions of this article, shall be paid into a special fund of the Department of Labor, and the proceeds of such license fees shall be used for the purpose of the supervision and regulation of the employment agencies, including costs of investigations or hearings to revoke licenses and the necessary traveling expenses and other expenditures incurred in administering this article. (1929, c. 178, s. 8; 1931, c. 312, s. 3.)
- § 95-45. Violations.—Any person, firm or corporation conducting an employment agency in the State of North Carolina, in violation of this article shall be guilty of a misdemeanor, and if a person punishable by a fine of not less than five hundred dollars, or imprisonment of not less than six months, or both; and if a corporation by a fine of not less than five hundred dollars and not more than one thousand dollars. (1929, c. 178, s. 9.)
- § 95-46. Government employment agencies unaffected.—This article shall not in any manner affect or apply to any employment agency operated by the State of North Carolina, the government of the United States, or any city, county or town, or any agency thereof. (1929, c. 178, s. 10.)
- § 95-47. License taxes placed upon agencies under Revenue Act, not affected.—This article shall in nowise conflict with or affect any license

tax placed upon such employment agencies by the General Revenue Act of North Carolina but instead shall be construed as supplementary thereto in exercising the police powers of the State. (1929, c. 178, s. 11.)

ARTICLE 6.

Separate Toilets for Sexes and Races.

- § 95-48. When separate toilets required; penalty. All persons and corporations employing males and females in any manufacturing industry, or other business employing more than two males and females in towns and cities having a population of one thousand persons or more, and where such employees are required to do indoor work chiefly, shall provide and keep in a cleanly condition separate and distinct toilet rooms for such employees, said toilets to be lettered and marked in a distinct manner, so as to furnish separate facilities for white males, white females, colored males and colored females: Provided, that the provisions of this section shall not apply to cases where toilet arrangements or facilities are furnished by said employer off the premises occupied by him. (1913, c. 83, s. 1; C. S., s. 6559.)
- § 95-49. Location; intruding on toilets misdemeanor.—It shall be the duty of the persons or corporations mentioned under this article to locate their toilets for males and females, white and colored, in separate parts of their buildings or grounds in buildings hereafter erected, and in those now erected all closets shall be separated by substantial walls of brick or timber, and any employee who shall willfully intrude upon or use any toilet not intended for his or her sex or color shall be guilty of a misdemeanor and upon conviction shall be fined five dollars. (1913, c. 83, s. 4; C. S., s. 6560.)
- § 95-50. Punishment for violation of article.—If any person, firm, or corporation refuses to comply with the provisions of this article, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1913, c. 83, s. 2; 1919, c. 100, s. 12; C. S., s. 6561.)
- § 95-51. Police in towns to enforce article.—The police officers of any town or city shall investigate the places of business of any person or corporation employing males and females and see that the provisions of this article are put in force, and shall swear out a warrant before the mayor or other proper officer of any town or city and prosecute all persons, corporations, and managers of corporations violating any of the provisions of this article. (1913, c. 83, s. 3; C. S., s. 6562.)
- § 95-52. Sheriff in county to enforce article.—When any persons or corporations locate their manufacturing plant or other business outside of any city or town, the sheriff of the county shall investigate the condition of the toilets used by such manufacturing plant or business and see that the provisions of this article are complied with, and shall swear out a warrant before a justice of the peace and prosecute anyone violating the provisions of this article. (1913, c. 83, s. 5; C. S., s. 6563.)

Local Modification.—Cleveland, Harnett, Polk, Rutherford and Sampson: C. S., § Henderson, Johnston, Lee, Northampton, 6564.

§ 95-53. Enforcement by Department of Labor.—The Department of Labor shall investigate the places of business of any person or corporation employing males and females, and shall make such rules and regulations for enforcing and carrying out this article as may be necessary. (1919, c. 100, s. 7; C. S., s. 6563(a); 1931, c. 312, ss. 12, 14.)

ARTICLE 7.

Board of Boiler Rules and Bureau of Boiler Inspection.

- 95-54. Board of Boiler Rules created; members, appointment, and qualifications; terms of office; vacancies; meetings.—There is hereby created the North Carolina Board of Boiler Rules consisting of five members, of whom four shall be appointed to the Board by the Governor, one for a term of one year, one for a term of two years, one for a term of three years and one for a term of four years. At the expiration of their respective terms of office, their successors shall be appointed for terms of four years each. Upon the death or incapacity of any member, the vacancy for the remainder of the term shall be filled with a representative of the same class. Of these four appointed members, one shall be a representative of the owners and users of steam boilers within the State of North Carolina, one a representative of the boiler manufacturers or a boilermaker who has had not less than five years' practical experience as a boilermaker within the State of North Carolina, one a representative of a boiler inspection and insurance company licensed to do business within the State of North Carolina, and one a representative of the operating steam engineers in the State of North Carolina. The fifth member shall be the Commissioner of Labor, who shall be chairman of the Board. The Board shall meet at least twice yearly at the State capital or other place designated by the Board. (1935, c. 326, s. 1.)
- § 95-55. Formulation of rules and regulations.—The Board shall formulate rules and regulations for the safe and proper construction, installation, repair, use and operation of steam boilers in this State. The rules and regulations so formulated shall conform as nearly as possible to the boiler code of the American Society of Mechanical Engineers and amendments and interpretations thereto made and approved by the council of the Society. (1935, c. 326, s. 1.)
- § 95-56. Approval of rules and regulations by Governor.—The rules and regulations formulated by the Board of Boiler Rules shall become effective upon approval by the Governor, except that rules applying to the construction of new boilers shall not become effective to prevent the installation of such new boilers until six months after approval by the Governor. Changes in the rules which would raise the standards governing the methods of construction of new boilers or the quality of material used in them shall not become effective until six months after approval by the Governor. (1935, c. 326, s. 2.)
- § 95-57. Compensation and expenses of Board.—The members of the Board of Boiler Rules, exclusive of the chairman thereof, shall serve without salary and shall receive their actual expenses, not to exceed their actual railroad fare plus four dollars (\$4.00) per day each, for not to exceed twenty days in any year while in the performance of their duties as members of the Board, to be paid in the same manner as in case of other State officers. The chairman of the Board of Boiler Rules shall countersign all vouchers for expenditures under this section. (1935, c. 326, s. 3.)
- § 95-58. Effect of article on boilers installed prior to enactment.—This article shall not be construed as in any way preventing the use or sale of steam boilers in this State which shall have been installed or in use in this State prior to the taking effect of this article and which shall have been made to conform to the rules and regulations of the Board of Boiler Rules governing existing installations as provided in § 95-66. (1935, c. 326, s. 4.)
- § 95-59. Commissioner of Labor empowered to appoint chief inspector; qualifications; salary.—After the passage of this article and at any time thereafter that the office may become vacant, the Commissioner of Labor shall appoint, and may remove for cause when so appointed, a citizen of this State who shall have had at the time of such appointment not less than

five years' practical experience with steam boilers as a steam engineer, mechanical engineer, boilermaker or boiler inspector, or who has passed the same kind of examination as that prescribed for deputy or special inspectors in § 95-63, to be chief inspector for a term of two years or until his successor shall have been appointed, at an annual salary to be fixed by the Commissioner of Labor with the approval of the Assistant Director of the Budget. (1935, c. 326, s. 5; 1943, c. 469.)

Editor's Note.—Prior to the 1943 amendment the salary was fixed at \$2,000.

§ 95-60. Certain boilers excepted.—This article shall not apply to boilers under federal control or to stationary boilers used by railroads which are inspected regularly by competent inspectors, or to boilers used solely for propelling motor road vehicles; or to boilers of steam fire engines brought into the State for temporary use in times of emergency to check conflagrations; or to portable boilers used for agricultural purposes only or for pumping or drilling in the open field for water, gas or coal, gold, talc or other minerals and metals; or to steam neating boilers which carry pressures not exceeding fifteen pounds per square inch, built in accordance with the boiler code of the American Society of Mechanical Engineers. (1935, c. 326, s. 6; 1937, c. 125, s. 1.)

Editor's Note.—Prior to the 1937 amendment this section excepted boilers used for heating purposes.

§ 95-61. Powers of Commissioner of Labor; creation of Bureau of Boiler Inspection.—The Commissioner of Labor is hereby charged, directed and empowered:

(a) To set up in the Division of Standards and Inspections of the Department of Labor, a Bureau of Boiler Inspection to be supervised by the chief inspector provided for in § 95-59 and one or more deputy inspectors of boilers, who shall have passed the examination provided for in § 95-63, at a salary not to exceed the salary of a senior factory inspector, and such office help as may be necessary.

(b) To have free access for himself and his chief boiler inspector and deputies, during reasonable hours, to any premises in the State where a steam boiler is built or where a steam boiler or power plant apparatus is being installed or operated, for the purpose of ascertaining whether such boiler is built, installed and operated in accordance with the provisions of this article.

(c) To prosecute all violators of the provisions of this article.

(d) To issue, suspend and revoke inspection certificates allowing steam boilers to be operated, as provided in this article.

(e) To enforce the laws of the State governing the use of steam boilers and to

enforce the rules and regulations of the Board of Boiler Rules.

(f) To keep a complete record of the type, dimensions, age, condition, pressure allowed upon, location and date of the last inspection of all steam boilers to which this article applies.

(g) To publish and distribute among boiler manufacturers and others requesting them, copies of the rules and regulations adopted by the Board of Boiler Rules. (1935, c. 326, s. 7.)

§ 95-62. Provision for special inspectors; examination required.— In addition to the deputy boiler inspectors authorized by § 95-61, the Commissioner of Labor shall, upon the request of any company authorized to insure against loss from explosion of boilers in this State, issue to any boiler inspectors of said company commissions as special inspectors: Provided, that each such inspector before receiving his commission shall pass satisfactorily the examination provided for in § 95-63, or, in lieu of such examination, shall hold a certificate of competency as an inspector of steam boilers for a state that has a standard of ex-

amination equal to that of the State of North Carolina, or a certificate from the National Board of Boiler and Pressure Vessel Inspectors. The fee for such commission shall be one dollar (\$1.00) and one dollar (\$1.00) for each annual renewal thereof. Such special inspectors shall receive no salary from, nor shall any of their expenses be paid by, the State, and the continuance of a special inspector's commission shall be conditioned upon his continuing in the employ of a boiler inspection and insurance company duly authorized as aforesaid and upon his maintenance of the standards imposed by this article. Such special inspectors shall inspect all steam boilers insured by their respective companies, and the owners of such insured boilers shall be exempt from the payment of the fees provided for in § 95-68. Each company employing such special inspectors shall, within thirty days following each annual internal inspection made by such inspectors, file a report of such inspection with the Commissioner of Labor. (1935. c. 326, s. 8.)

§ 95-63. Examination for inspectors; revocation of commission. -Examination for deputy or special inspectors shall be given by the Board of Boiler Rules or by at least two examiners to be appointed by said Board and must be written or part written and part oral recorded in writing and must be confined to questions the answers to which will aid in determining the fitness and competency of the applicant for the intended service and must be of uniform grade throughout the State. In case an applicant for an inspector's appointment or commission fails to pass this examination, he may appeal to the Board of Boiler Rules for a second examination which shall be given by said Board, or ii by examiners appointed by said Board, then by examiners other than those by whom the first examination was given and these examiners shall be appointed forthwith to give said second examination. Upon the result of this examination on appeal, the Board shall determine whether the applicant be qualified. The record of any applicant's examination, whether original or on appeal, shall be accessible to him and his employer.

A commission may be revoked by the Commissioner of Labor upon the recommendation of the chief inspector of steam boilers, for the incompetence or untrustworthiness of the holder thereof or for willful falsification of any matter or statement contained in his application or in a report of any inspection. A person whose commission is revoked may appeal from the revocation to the Board of Boiler Rules which shall hear the appeal and either set aside or affirm the revocation and its decision shall be final. The person whose commission has been revoked shall be entitled to be present in person and by counsel on the hearing of the appeal. If a certificate or commission is lost or destroyed, a new certificate or commission shall be issued in its place without another examination. A person who has failed to pass the examination for a commission or whose commission has been revoked shall be entitled to apply for a new examination and commission after ninety days from such failure or revocation.

(1935, c. 326, s. 9.)

§ 95-64. Boiler inspections; fee; certificate; suspension.—On and after April first, nineteen hundred and thirty-five, each steam boiler used or proposed to be used within this State, except boilers exempt under § 95-60, shall be thoroughly inspected internally and externally while not under pressure by the chief inspector or by one of the deputy inspectors or special inspectors provided for herein, as to its design, construction, installation, condition and operation; and if it shall be found to be suitable, and to conform to the rules and regulations of the Board of Boiler Rules, the owner or user of a steam boiler as required in this article to be inspected shall pay to the chief inspector the sum of one dollar (\$1.00) for each inspection certificate issued, and the chief inspector shall issue to the owner or user thereof an inspection certificate specifying the maximum pressure which it may be allowed to carry. Such inspection certificate

shall be valid for not more than fourteen months from its date, and it shall be posted under glass in the engine or boiler room containing such boiler, or an engine operated by it, or, in the case of a portable boiler, in the office of the plant where it is located for the time being. No inspection certificate issued for a boiler inspected by a special inspector shall be valid after the boiler for which it was issued shall cease to be insured by a duly authorized insurance company. The chief inspector or any deputy inspector may, at any time, suspend an inspection certificate when, in his opinion, the boiler for which it was issued may not continue to be operated without menace to the public safety, or when the boiler is found not to comply with the rules herein provided for and a special inspector shall have corresponding powers with respect to inspection certificates for boilers insured by the company employing him. Such suspension of an inspection certificate shall continue in effect until said boiler shall have been made to conform to the rules and regulations of the Board of Boiler Rules and until said inspection certificate shall have been reinstated by a State inspector, if the inspection certificate was suspended by a State inspector, or by a special inspector, if it was suspended by a special inspector. Not more than fourteen months shall elapse between such inspections and there shall be at least four such inspections in thirty-seven consecutive months. Each such boiler shall also be inspected externally while under pressure with at least the same frequency, and at no greater intervals. (1935, c. 326, s. 10; 1937, c. 125, s. 2; 1939, c. 361, s. 1.)

Editor's Note. — The 1937 amendment, first sentence, was repealed by the 1939 which struck out the fee provision in the amendment.

- § 95-65. Operation of unapproved boiler prohibited.—On and after July first, nineteen hundred and thirty-five, it shall be unlawful for any person, firm, partnership or corporation to operate under pressure in this State a steam boiler to which this article applies without a valid inspection certificate as provided for in this article. The operation of a steam boiler without an inspection certificate shall constitute a misdemeanor on the part of the owner, user or operator thereof and be punishable by a fine not exceeding one hundred dollars (\$100) or imprisonment not to exceed thirty days, or both, in the discretion of the court. (1935, c. 326, s. 11.)
- § 95-66. Installation of boilers not conforming to requirements prohibited; boilers now in use to conform.—No steam boiler which does not conform to the rules and regulations formulated by the Board of Boiler Rules governing new installations shall be installed in this State after six months from the date upon which the said rules and regulations shall become effective by the approval of the Governor.

All steam boilers installed and ready for use, or being used, before the said six months shall have elapsed, shall be made to conform to the rules and regulations of the Board of Boiler Rules governing existing installations and the formula therein prescribed shall be used in determining the maximum allowable working pressure for such boilers. (1935, c. 326, s. 12.)

§ 95-67. Inspection of boilers during construction in State; outside State. — All boilers to be installed after six months from the date upon which the rules and regulations of the Board of Boiler Rules shall become effective by the approval of the Governor shall be inspected during construction by an inspector authorized to inspect boilers in this State, or if constructed outside the State, by an inspector holding a certificate of authority from the Commissioner of Labor of this State, which certificate shall be issued by the said Commissioner of Labor to any inspector who holds a certificate of authority to inspect steam boilers issued by a state which shall have adopted boiler rules that require standards of construction and operation substantially equal to those of this State,

or an inspector who holds a certificate of inspection issued by the National Board of Boiler and Pressure Vessel Inspectors. (1935, c. 326, s. 12.)

§ 95-68. Fees for internal and external inspections.—The owner or user of a steam boiler, required by this article to be inspected by the chief boiler inspector or a deputy inspector, shall pay to the inspector six (\$6.00) dollars for each fire tube boiler over thirty inches in diameter internally inspected and four (\$4.00) dollars for each fire tube boiler over thirty inches in diameter externally inspected while under pressure and shall pay to the inspector four (\$4.00) dol-lars for each fire tube boiler up to and including thirty inches in diameter internally inspected and three (\$3.00) dollars for each fire tube boiler up to and including thirty inches in diameter externally inspected while under pressure. All water tube boilers shall be charged six (\$6.00) dollars for each internal inspection and four (\$4.00) dollars for each external inspection while under pressure. Not more than ten (\$10.00) dollars shall be collected for any one fire tube boiler over thirty inches in diameter for any one year. Not more than seven (\$7.00) dollars shall be collected for any one fire tube boiler up to and including thirty inches in diameter for any one year. Not more than ten (\$10.00) dollars shall be collected for any water tube boiler for any one year: Provided, that one (\$1.00) dollar of each internal inspection fee shall be the fee for the certificate of inspection required by § 95-64. The inspector shall give receipts for said fees and shall pay all sums so received to the Commissioner of Labor, who shall pay the same to the Treasurer of the State. The Treasurer of the State shall hold the fees collected under this section and under § 95-64 in a special account to pay the salaries and expenses incident to the administration of this article, the surplus, with the approval of the Director of the Budget, to be added to the appropriation of the Division of Standards and Inspections of the Department of Labor for its general inspectional service. (1935, c. 326, s. 13; 1937, c. 125, s. 3; 1939, c. 361, s. 2.)

Editor's Note.—The 1939 amendment rewrote this section.

§ 95-69. Bonds of chief inspector and deputy inspectors.—The chief inspector shall furnish a bond in the sum of five thousand dollars (\$5,000), and each of the deputy inspectors shall furnish a bond in the sum of one thousand dollars (\$1,000), conditioned upon the faithful performance of their duties and upon a true account of moneys handled by them respectively, and the payment thereof to the proper recipient. The cost of said bonds shall be paid by the State Treasurer out of the special fund provided for in § 95-68. (1935, c. 326, s. 14; 1937, c. 125, s. 4.)

Editor's Note.—Prior to the 1937 amendment this section excepted certain counties and ground sawmills.

ARTICLE 8.

Bureau of Labor for the Deaf.

- § 95-70. Creation. There shall be created in the Department of Labor a division devoted to the deaf. (1923, c. 122, s. 1; C. S., s. 7312(j); 1931, c. 312, s. 3.)
- § 95-71. Appointment of chief of Bureau; duties.—The Commissioner of Labor shall appoint a competent deaf man to take charge of such division, who shall devote his time to the special work of labor for the deaf under the supervision of the Commissioner of Labor, and who shall be designated chief of the Bureau of Labor for the Deaf. He shall collect statistics of the deaf, ascertain what trades or occupations are most suitable for them and best adapted to promote their interest, and use his best efforts to aid them in securing such

employment as they may be fitted to engage in. He shall study the methods in use in the education of the deaf as exemplified in the deaf themselves, with a view to determining their practicability and respective values in lifting them to become self-supporting, useful citizens and enabling them to obtain the greatest amount of happiness in life. He shall keep a census of the deaf and obtain facts, information and statistics as to their condition in life, with a view to the betterment of their lot. He shall endeavor to obtain statistics and information of the condition of labor and employment and education of the deaf in other states, with a view to promoting the general welfare of the deaf in this State. He shall make reports and recommendations from time to time as may be provided by law, and he shall also issue special reports or pamphlets as may be deemed necessary, giving results and information that may be helpful. (1923, c. 122, ss. 2, 3; C. S., s. 7312(k); 1931, c. 312, s. 3.)

§ 95-72. Assignment of other duties.—In case the duties herein enumerated should not occupy all of the time of such chief of the Bureau of Labor for the Deaf, he shall perform such other duties in the Department of Labor as may be assigned him by the Commissioner of Labor. (1923, c. 122, s. 5; C. S., s. 7312(m); 1931, c. 312, s. 3.)

ARTICLE 9.

Earnings of Employees in Interstate Commerce.

§ 95-73. Collections out of State to avoid exemptions forbidden .-No resident creditor or other holder of any book account, negotiable instrument, duebill or other monetary demand arising out of contract, due by or chargeable against any resident wage earner or other salaried employee of any railway corporation or other corporation, firm, or individual engaged in interstate business shall send out of the State, assign, or transfer the same, for value or otherwise. with intent to thereby deprive such debtor of his personal earnings and property exempt by law from application to the payment of his debts under the laws of the State of North Carolina, by instituting or causing to be instituted thereon against such debtor, in any court outside of this State, in such creditor's own name or in the name of any other person, any action, suit, or proceeding for the attachment or garnishment of such debtor's earnings in the hands of his employer, when such creditor and debtor and the railway corporation or other corporation, firm, or individual owing the wages or salary intended to be reached are under the jurisdiction of the courts of this State. (1909, c. 504, s. 1; C. S., s. 6568.)

effort is made, in the foreign state by attachment or garnishment, to deprive the 392, 35 S. E. (2d) 234 (1945).

The resident creditor is not forbidden resident debtor of his personal earnings to send his claim out of the State for col- and property exempt from application to lection by suit or otherwise, provided no the payment of his debts under the laws of this State. Padgett v. Long, 225 N. C.

- § 95-74. Resident not to abet collection out of State. No person residing or sojourning in this State shall counsel, aid, or abet any violation of the provisions of § 95-73. (1909, c. 504, s. 2; C. S., s. 6569.)
- § 95-75. Remedies for violation of § 95-73 or 95-74; damages; indictment.—Any person violating any provisions of § 95-73 or 95-74 shall be answerable in damages to any debtor from whom any book account, negotiable instrument, duebill, or other monetary demand arising out of contract shall be collected, or against whose earnings any warrant of attachment or notice of garnishment shall be issued, in violation of the provisions of § 95-73, to the full amount of the debt thus collected, attached, or garnisheed, to be recovered by civil action in any court of competent jurisdiction in this State; and any person so offending

shall likewise be guilty of a misdemeanor, punishable by a fine of not more than two hundred dollars. (1909, c. 504, s. 3; C. S., s. 6570.)

Necessary Allegation.—In a suit to recover damages for violation of the provisions of § 95-73, an allegation that the forbidden purpose was accomplished, by instituting in the foreign state an action, suit or proceeding for the attachment or garnishment of the debtor's earnings in the hands of his employer, would seem to be

an essential element of the cause of action. An allegation that the debtor was threatened with attachment or garnishment of his wages and was forced to pay the foreign judgment in order to avoid same, is not sufficient. Padgett v. Long, 225 N. C. 392, 35 S. E. (2d) 234 (1945).

§ 95-76. Institution of foreign suit, etc., evidence of intent to violate.—In any civil or criminal action instituted in any court of competent jurisdiction in this State for any violation of the provisions of §§ 95-73 and 95-74, proof of the institution or prosecution of any action, suit, or proceeding in violation of the provisions of § 95-73, or the issuance of service therein of any warrant of attachment, notice, or garnishment or other like writ for the garnishment of earnings of the defendant therein, or of the payment by the garnishee therein of any final judgment rendered in any such action, suit, or proceeding shall be deemed prima facie evidence of the intent of the creditor or other holder of the debt sued upon to deprive such debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this State, in violation of the provisions of this article. (1909, c. 504, s. 4; C. S., s. 6571.)

§ 95-77. Construction of article.—No provision of this article shall be so construed as to deprive any person entitled to its benefits of any legal or equitable remedy already possessed under the laws of this State. (1909, c. 504, s. 5; C. S., s. 6572.)

ARTICLE 10.

Declaration of Policy as to Labor Organizations.

§ 95-78. Declaration of public policy.—The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association. (1947, c. 328, s. 1.)

Editor's Note.—For discussion of this

article, see 25 N. C. Law Rev. 447.

Article Is Constitutional.—This article does not abridge the freedom of speech and the opportunities of unions and their members "peaceably to assemble and to petition the government for a redress of grievances," which are guaranteed by the First Amendment and made applicable to the states by the Fourteenth Amendment. Nor does it conflict with Art. I, § 10, of the Constitution, insofar as it impairs the obligation of contracts made prior to its enactment. Nor does it deny unions and their members equal protection of the laws contrary to the Fourteenth Amendment. Nor does it deprive employers, unions or members of unions of their liberty without due process of law in violation of the Fourteenth Amendment. Lincoln Federal Labor Union v. Northwestern Iron, etc., Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201 (1949), affirming State v. Whitaker, 228

N. C. 352, 45 S. E. (2d) 860 (1947).

This article is a valid exercise of the police power of the State, and does not violate § 17, Art. I, of the State Constitution. State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860 (1947), affirmed in Lincoln Federal Labor Union v. Northwestern Iron, etc., Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201 (1949).

Not Discriminatory.—This article is applicable to all employers and employees within the State, and therefore the fact that persons or groups coming within its scope must perforce be affected in different degrees because of the difference of their economic, social or political positions, does not render the act unconstitutional as discriminatory. State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860 (1947), affirmed in Lincoln Federal Labor Union v. Northwestern Iron, etc., Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201 (1949).

The violation of this article is a criminal

offense. State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860 (1947), affirmed in Lincoln Federal Labor Union v. Northwestern Iron, etc., Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201 (1949).

Punishable as for Misdemeanor.—This article is declaratory of public policy and was enacted in the interest of the public welfare, and therefore the violation of its

provisions is a criminal offense punishable as for a misdemeanor, notwithstanding the failure of the statute to prescribe a penalty for its breach. The fact that the act incidentally provides for the redress of private injuries does not alter this result. State v. Bishop, 228 N. C. 371, 45 S. E. (2d) 858 (1947).

- § 95-79. Certain agreements declared illegal.—Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina. (1947, c. 328, s. 2.)
- § 95-80. Membership in labor organization as condition of employment prohibited.—No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer. (1947, c. 328, s. 3.)
- § 95-81. Nonmembership as condition of employment prohibited.—No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. (1947, c. 328, s. 4.)
- § 95-82. Payment of dues as condition of employment prohibited.—No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees, or other charges of any kind to any labor union or labor organization. (1947, c. 328, s. 5.)
- § 95-83. Recovery of damages by persons denied employment.—Any person who may be denied employment or be deprived of continuation of his employment in violation of §§ 95-80, 95-81 and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment. (1947, c. 328, s. 6.)
- § 95-84. Application of article.—The provisions of this article shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract. (1947, c. 328, s. 7.)

Editor's Note. — The act inserting this article became effective on March 18, 1947.

Chapter 96.

Employment Security.

Article 1.

Employment Security Commission.

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ARTICLE 1

Employment Security Commission.

§ 96-1. Title.—This chapter shall be known and may be cited as the "Employment Security Law." (Ex. Sess. 1936, c. 1, s. 1; 1947, c. 598, s. 1.)

Cross Reference.—For provision not applicable to activities of Commission in respect to veterans, see § 165-11.

Editor's Note.—The 1947 amendment. effective April 1, 1947, substituted "Employment Security Law" for "Unemploy-

ment Compensation Law."

For article discussing unemployment compensation, see 15 N. C. Law Rev. 377. For discussion of the 1939 and 1947 amendments to this chapter, see 17 N. C. Law Rev. 415, and 25 N. C. Law Rev. 415.

The General Assembly may determine the scope of this chapter, and the defini-tions and tests prescribed will be applied by the courts in accordance with the legislative intent. Unemployment Compensation Comm. v. City Ice, etc., Co., 216 N. C. 6, 3 S. E. (2d) 290 (1939).

Construction in Favor of Validity.-The intent of the legislature to provide a wide scope in the application of this chapter to mitigate the economic evils of unemployment, and to bring within its provisions employments therein defined beyond the scope of existing definitions or categories, is apparent from the language used, and all doubts as to constitutionality should be resolved in favor of the validity of the chapter and all its provisions. State v. Willis Barber, etc., Shop, 219 N. C. 709,

15 S. E. (2d) 4 (1941). Weight to Be Given Official Construction.-Our State Unemployment Compensation Act (now Employment Security Law) was passed pursuant to a plan national in scope, and therefore serious consideration is to be given to the construction placed upon similar language of the federal statute by the Commissioner of Internal Revenue, but the interpretation of the act is finally for our courts, and neither the ruling of the Commissioner nor

that of the State Unemployment Compensation Commission (now Employment Security Commission) is conclusive. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592 (1939).

Cited in B-C Remedy Co. v. Unemployment Compensation Comm., 226 N. C. 52, 36 S. E. (2d) 733, 163 A. L. R. 773 (1946).

§ 96-1.1. Change in title of Law and names of Commission and funds.—Wherever the words "Unemployment Compensation Law" are used or appear in any statute of this State, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Law" shall be inserted in lieu thereof; wherever the words "Unemployment Compensation Commission" are used or appear in any statute of this State, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Commission" shall be inserted in lieu thereof; wherever the words "Unemployment Compensation Administration Fund" are used or appear in any statute of this State, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Administration Fund" shall be inserted in lieu thereof; wherever the words "Special Unemployment Compensation Administration Fund" are used or appear in any statute of this State, heretofore or hereafter enacted, the same shall be stricken out and the words "Special Employment Security Administration Fund" shall be inserted in lieu thereof; wherever the words "State Unemployment Commission" are used or appear in any statute of this State, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Commission" shall be inserted in lieu thereof; wherever the words "North Carolina Unemployment Commission" are used or appear in any statute of this State, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Commission" shall be inserted in lieu thereof.

The sole purpose of this section is to effectuate a change in the name of the "Unemployment Compensation Commission of North Carolina" to the "Employment Security Commission of North Carolina;" to change the name of the "Unemployment Compensation Law" to "Employment Security Law;" to change the name of the "Unemployment Compensation Administration Fund" to "Employment Security Administration Fund;" to change the name of the "Special Unemployment Compensation Administration Fund" to "Special Employment Security Administration Fund;" to change the words "State Unemployment Commission" to "Employment Security Commission;" to change the words "North Carolina Unemployment Commission" to "Employment Security Commission" wherever such names are used or appear in any statute of this State, heretofore or hereafter enacted. (1947, c. 598, s. 1.)

- § 96-1.2. Members of Unemployment Compensation Commission; tenure of office and rights and duties.—The present members of the Unemployment Compensation Commission of North Carolina shall continue their tenure of office as commissioned by the Governor; and all rights, powers, duties and obligations of every nature heretofore exercised by such individuals as members of the Unemployment Compensation Commission of North Carolina shall continue in such individuals as members of the Employment Security Commission of North Carolina. (1947, c. 598, s. 2.)
- § 96-1.3. Succeeding to rights, powers and duties of Unemployment Compensation Commission.—The Employment Security Commission of North Carolina shall automatically succeed to all the rights, powers, duties and obligations of whatever nature of the present Unemployment Compensation Commission of

North Carolina; and the duties and powers imposed upon and vested in the Unemployment Compensation Commission of North Carolina by law shall devolve and be imposed upon, vested in and merged with the duties and powers of the Employment Security Commission of North Carolina; and all obligations, liens and judgments in favor of the Unemployment Compensation Commission of North Carolina shall inure to and be vested in the Employment Security Commission of North Carolina; and the Employment Security Commission of North Carolina is authorized and empowered to enforce and collect any and all obligations, liens and judgments due the present Unemployment Compensation Commission of North Carolina; and the Employment Security Commission is authorized to continue to use any and all printed forms bearing the name of the Unemployment Compensation Commission or the Unemployment Compensation Commission of North Carolina, including warrants or vouchers against the State Treasurer, until the present supply of such printed forms and/or warrants or vouchers is exhausted; and the State Treasurer and State Auditor are hereby authorized, empowered and directed to honor any and all such warrants or vouchers as well as any and all warrants or vouchers bearing the name of the Employment Security Commission of North Carolina. (1947, c. 598, s. 3.)

- § 96-1.4. Records and funds transferred to Employment Security Commission.—All records, files and property of the Unemployment Compensation Commission of North Carolina are hereby transferred and made available to the Employment Security Commission of North Carolina. All unexpended balances of any appropriation or other funds of the Unemployment Compensation Commission of North Carolina are hereby transferred to the appropriate fund of the Employment Security Commission of North Carolina and made available to the Employment Security Commission of North Carolina. (1947, c. 598, s. 4.)
- § 96-2. Declaration of State public policy.—As a guide to the interpretation and application of this chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor re-The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. (Ex. Sess. 1936, c. 1,

Cross Reference.—As to intent to provide wide scope in application of chapter, see note to § 96-1.

The matter of policy is in the exclusive province of the legislature and the courts will not interfere therewith unless the provisions relating thereto have no reasonable relations to the end sought to be accomplished. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941), applying provisions seeking to make State neutral in labor disputes.

§ 96-3. Employment Security Commission. — (a) Organization. — There is hereby created a commission to be known as the Employment Security Commission of North Carolina. The Commission shall consist of seven (7) members to be appointed by the Governor on or before July 1, 1941. The Governor shall have the power to designate the member of said Commission who shall

act as the chairman thereof. The chairman of the Commission shall not engage in any other business, vocation or employment, and no member of the Commission shall serve as an officer or a committee member of any political party organization. Three (3) members of the Commission shall be appointed by the Governor to serve for a term of two (2) years. Three (3) members shall be appointed to serve for a term of four (4) years, and upon the expiration of the respective terms, the successors of said members shall be appointed for a term of four (4) years each, thereafter, and the member of said Commission designated by the Governor as chairman shall be appointed for a term of four (4) years from and after his appointment. Any member appointed to fill a vacancy occurring in any of the appointments made by the Governor prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. The Governor may at any time after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

(b) Divisions.—The Commission shall establish two co-ordinate divisions: the North Carolina State Employment Service Division, created pursuant to § 96-20, and the Unemployment Compensation Division. Each division shall be responsible for the discharge of its distinctive functions. Each division shall be a separate administrative unit with respect to personnel and duties, except in so

far as the Commission may find that such separation is impracticable.

(c) Salaries.—The chairman of the Employment Security Commission of North Carolina, appointed by the Governor, shall be paid from the Employment Security Administration Fund a salary payable on a monthly basis, which salary shall be fixed by the Governor with the approval of the council of State; and the members of the Commission, other than the chairman, shall each receive ten dollars (\$10.00) per day including necessary time spent in traveling to and from his place of residence within the State to the place of meeting while engaged in the discharge of the duties of his office and his actual traveling expenses, the same to be paid from the aforesaid fund.

(d) Quorum.—The chairman and three (3) members of the Commission shall constitute a quorum. (Ex. Sess. 1936, c. 1, s. 10; 1941, c. 108, s. 10; c. 279, ss.

1-3; 1943, c. 377, s. 15; 1947, c. 598, s. 1.)

Editor's Note.—The first 1941 amendment struck out the word "budget" from the last sentence of subsection (b). The second 1941 amendment increased the membership of the Commission from three to seven and made other changes in subsection (a). It also made changes in subsections (c) and (d). Section 6 of the second amendatory act vested in the Commission created by the act all the rights, powers, duties, and obligations of the former Commission and of the State Advisory Council. For comment on amendment, see 19 N. C. Law Rev. 444.

The 1943 amendment inserted in subsection (c) the words "including necessary time spent in traveling to and from his place of residence within the State to the place of meeting."

The 1947 amendment substituted "Employment Security Commission" for "Unemployment Compensation Commission."

Commission Is State Agency.—The Commission is an agency created by statute for a public purpose and is an agency of the State. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

§ 96-4. Administration.—(a) Duties and Powers of Commission.—It shall be the duty of the Commission to administer this chapter. The Commission shall meet at least once in each sixty days and may hold special meetings at any time at the call of the chairman or any three (3) members of the Commission, and the Commission shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable in the administration of this chapter. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this chapter, which the Commission shall prescribe. The

Commission shall determine its own organization and methods of procedure in accordance with the provisions of this chapter, and shall have an official seal which shall be judicially noticed. The chairman of said Commission shall, except as otherwise provided by the Commission, be vested with all authority of the Commission, including the authority to conduct hearings and make decisions and determinations, when the Commission is not in session and shall execute all orders, rules and regulations established by said Commission. Not later than November twentieth preceding the meeting of the General Assembly, the Commission shall submit to the Governor a report covering the administration and operation of this chapter during the preceding biennium, and shall make such recommendation for amendments to this chapter as the Commission deems proper. Such report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then current contributions, which reserve shall be set up by the Commission in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period. Whenever the Commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, it shall promptly so inform the Governor and the legislature, and make recommendations with respect thereto.

- (b) Regulations and General and Special Rules.—General and special rules may be adopted, amended, or rescinded by the Commission only after public hearing or opportunity to be heard thereon, of which proper notice has been given by mail to the last known address in cases of special rules, or by publication as herein provided, and by one publication as herein provided as to general rules. General rules shall become effective ten days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this State. Special rules shall become effective ten days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the Commission and shall become effective in the manner and at the time prescribed by the Commission.
- (c) Publication.—The Commission shall cause to be printed for distribution to the public the text of this chapter, the Commission's regulations and general rules, its biennial reports to the Governor, and any other material the Commission deems relevant and suitable, and shall furnish the same to any person upon application therefor.
- (d) Personnel.—Subject to other provisions of this chapter, the Commission is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. It shall provide for the holding of examinations to determine the qualifications of applicants for the positions so classified, and except for temporary appointments not to exceed six months in duration, shall appoint its personnel on the basis of efficiency and fitness as determined in such examinations. All positions shall be filled by persons selected and appointed on a nonpartisan merit basis. The Commission shall not employ or pay any person who is an officer or committee member of any political party organization. The Commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this chapter, and may, in its discretion, bond any person handling moneys or signing checks hereunder.
- (e) Advisory Councils.—The Governor shall appoint a State Advisory Council and local advisory councils, composed in each case of an equal number of employer representatives and employee representatives who may fairly be regarded as representative because of their vocation, employment, or affiliations, and have such members representing the general public as the Governor may designate. Such

councils shall aid the Commission in formulating policies and discussing problems related to the administration of this chapter, and in assuring impartiality and freedom from political influence in the solution of such problems. Such local advisory councils shall serve without compensation, but shall be reimbursed for any necessary expenses. The State Advisory Council shall be paid ten dollars per day per each member attending actual sitting of such Council, including necessary time spent in traveling to and from their place of residence within the State to the place of meeting, and mileage and subsistence as allowed to State officials.

- (f) Employment Stabilization.—The Commission, with the advice and aid of its advisory councils, and through its appropriate divisions, shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; to investigate, recommend, advise, and assist in the establishment and operation, by municipalities, counties, school districts, and the State, of reserves for public works to be used in times of business depression and unemployment; to promote the re-employment of unemployed workers throughout the State in every other way that may be feasible; and to these ends to carry on and publish the results of investigations and research studies.
- (g) Records and Reports.—(1) Each employing unit shall keep true and accurate employment records, containing such information as the Commission may prescribe. Such records shall be open to inspection and be subject to being copied by the Commission or its authorized representatives at any reasonable time and as often as may be necessary. The Commission may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which the Commission deems necessary for the effective administration of this chapter. Information thus obtained shall not be published or be open to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the employing unit's identity, but any claimant at a hearing before an appeal tribunal or the Commission shall be supplied with information from such records to the extent necessary for the proper presentation of his claims. Any individual may be supplied with information as to his potential benefit rights from such records. Any employee or member of the Commission who violates any provision of this section shall be fined not less than twenty dollars (\$20.00) nor more than two hundred dollars (\$200.00), or imprisoned for not longer than ninety days, or both. All reports, statements, information and communications of every character so made or given to the Commission, its deputies, agents, examiners and employees, whether same be written, oral or in the form of testimony at any hearing, or whether obtained by the Commission from the employing unit's books and records shall be absolute privileged communications in any civil or criminal proceedings other than proceedings instituted pursuant to this chapter and proceedings involving the administration of this chapter: Provided, nothing herein contained shall operate to relieve any employing unit from disclosing any information required by this chapter or as prescribed by the Commission involving the administration of this chapter.
- (2) If the Commission finds that any employer has failed to file any report or return required by this chapter or any regulation made pursuant hereto, or has filed a report which the Commission finds incorrect or insufficient, the Commission may make an estimate of the information required from such employer on the basis of the best evidence reasonably available to it at the time, and make, upon the basis of such estimate, a report or return on behalf of such employer, and the report or return so made shall be deemed to be prima facie correct, and the Commission may make an assessment based upon such report and proceed to collect contributions due thereon in the manner as set forth in § 96-10 (b) of this chapter: Provided, however, that no such report or return shall be made until the employer has first been given at least ten days' notice by registered mail to the last known address of such employer: Provided further, that no such report or

return shall be used as a basis in determining whether such employing unit is an

employer within the meaning of this chapter.

(h) Oaths and Witnesses.—In the discharge of the duties imposed by this chapter, the chairman of an appeal tribunal and any duly authorized representative or member of the Commission shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a dis-

puted claim or the administration of this chapter.

(i) Subpoenas.—In case of contumacy by, or refusal to obey a subpoena issued to any person by the Commission or its authorized representative, any clerk of a superior court of this State within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Commission, or its duly authorized representatives, shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission, or its duly authorized representatives, there to produce evidence if so ordered, or there to give testimony touching upon the matter under investigation or in question; and any failure to obey such order of the said clerk of superior court may be punished by the said clerk of superior court as a contempt of said court. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, or other records in obedience to a subpoena of the Commission, shall be punished by a fine of not more than fifty dollars (\$50.00) or by imprisonment for not longer than thirty days.

(j) Protection against Self-Incrimination. — No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the Commission or in obedience to the subpoena of the Commission or any member thereof, or any duly authorized representative of the Commission, in any cause or proceeding before the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so

testifying.

(k) State-Federal Co-Operation. — In the administration of this chapter, the Commission shall co-operate, to the fullest extent consistent with the provisions of this chapter, with the Social Security Administration, created by the Social Security Act, approved August fourteenth, one thousand nine hundred and thirtyfive, as amended; shall make such reports, in such form and containing such information as the Social Security Administration may from time to time require, and shall comply with such provisions as the Social Security Administration may from time to time find necessary to assure the correctness and verification of such reports; and shall comply with the regulations prescribed by the Social Security Administration governing the expenditures of such sums as may be allotted and paid to this State under Title III of the Social Security Act for the purpose of assisting in the administration of this chapter. The Commission shall further make its records available to the Railroad Retirement Board, created by the Railroad Retirement Act and the Railroad Unemployment Insurance Act, and shall furnish to the Railroad Retirement Board at the expense of the Railroad Retirement Board, such copies thereof as the Board shall deem necessary for its purposes in accordance with the provisions of section three hundred three (c) of the Social Security Act as amended.

Upon request therefor, the Commission shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of benefits, and such recipient's rights to further

benefits under this chapter.

The Commission is authorized to make such investigations, secure and transmit such information, make available such services and facilities and exercise such of the other powers provided herein with respect to the administration of this chapter as it deems necessary or appropriate to facilitate the administration of any employment security or public employment service law, and in like manner, to accept and utilize information, services and facilities made available to this State by the agency charged with the administration of such other employment security or public employment service law.

The Commission is also authorized and directed to apply for an advance to the Unemployment Compensation Fund and to accept the responsibility for the repayment of such advance in accordance with the conditions specified in Title XII of the Social Security Act, as amended, in order to secure to this State and its

citizens the advantages available under the provisions of such title.

The Commission shall fully co-operate with the agencies of other states and shall make every proper effort within its means to oppose and prevent any further action which would, in its judgment, tend to effect complete or substantial federalization of State unemployment compensation funds or State employment security programs.

(1) Reciprocal Arrangements.—(1) The Commission is hereby authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies

of other states or of the federal government, or both, whereby:

(A) Services performed by an individual for a single employing unit for which services are customarily performed in more than one state shall be deemed to be services performed entirely within any one of the states (i) in which any part of such individual's service is performed or (ii) in which such individual has his residence or (iii) in which the employing unit maintains a place of business, provided there is in effect, as to such services, an election by the employing unit, approved by the agency charged with the administration of such state's employment security law, pursuant to which the services performed by such individual for such employing unit are deemed to be performed entirely within such state;

(B) Potential rights to benefits accumulated under the employment security laws of one or more states or under one or more such laws of the federal government, or both, may constitute the basis for the payment of benefits through a single appropriate agency under terms which the Commission finds will be fair and reasonable as to all affected interests and will not result in any substantial

loss to the fund;

(C) Wages or services, upon the basis of which an individual may become entitled to benefits under an employment security law of another state or of the federal government, shall be deemed to be wages for insured work for the purpose of determining his rights to benefits under this chapter, and wages for insured work, on the basis of which an individual may become entitled to benefits under this chapter shall be deemed to be wages or services on the basis of which unemployment compensation under such law of another state or of the federal government is payable, but no such arrangement shall be entered into unless it contains provisions for reimbursements to the fund for such of the benefits paid under this chapter upon the basis of such wages or services, and provisions for reimbursements from the fund for such of the compensation paid under such other law upon the basis of wages for insured work, as the Commission finds will be fair and reasonable as to all affected interests; and

(D) Contributions due under this chapter with respect to wages for insured work shall for the purposes of § 96-10 be deemed to have been paid to the fund

as of the date payment was made as contributions therefor under another state or federal employment security law, but no such arrangement shall be entered into unless it contains provisions for such reinbursement to the fund of such contributions as the Commission finds will be fair and reasonable as to all affected interests.

(E) The services of the Commission may be made available to such other agencies to assist in the enforcement and collection of judgments of such other

agencies.

- (F) The services on vessels engaged in interstate or foreign commerce for a single employer, wherever performed, shall be deemed performed within this State or within such other state.
- (G) Services performed by an individual for a single employing unit which customarily operates in more than one state shall be deemed to be services performed entirely within any of the states (i) in which such individual has residence or (ii) in which the employing unit maintains a place of business; provided there is in effect as to such service an election approved by the agency charged with the administration of such state's employment security law, pursuant to which all the services performed by such individual for such employing unit are deemed to be performed entirely within such state; provided, further, that no such election shall apply to more than three such individuals.
- (H) Wages earned by an individual in covered employment in more than one state which is less than the eligibility requirements of either of such states may be combined and constitute the basis for the payment of benefits through a single and appropriate agency under terms which the Commission finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the fund: Provided, that any benefits paid under the provisions of this subparagraph shall not be charged to the reserve account of any employer as provided in § 96-9, subsection (c) (2) of this chapter, but shall be charged to the partially pooled account: Provided further, that any such wages or services shall be deemed to be within the provisions of subparagraph (C) of this subsection.
- (2) Reimbursements paid from the fund pursuant to clause (C), of paragraph (1) of this subsection shall be deemed to be benefits for the purpose of §§ 96-6, 96-9 and 96-12. The Commission is authorized to make to other states or federal agencies and to receive from such other state or federal agencies, reimbursements from or to the fund, in accordance with arrangements entered into pursuant to paragraph (1) of this subsection.
- (3) To the extent permissible under the laws and Constitution of the United States, the Commission is authorized to enter into or co-operate in arrangements whereby facilities and services provided under this chapter and facilities and services provided under the employment security law of any foreign government, may be utilized for the taking of claims and the payment of benefits under the Employment Security Law of this State or under a similar law of such government.
- (m) The Commission after due notice shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and liabilities of any "employing unit" or "employer" as said terms are defined by § 96-8 (e) and § 96-8 (f) and subsections thereunder of this chapter. The Commission shall have the power and authority to determine any and all questions and issues of fact or questions of law that may arise under the Employment Security Law that may affect the rights, liabilities and status of any employing unit or employer as heretofore defined by the Employment Security Law including the right to determine the amount of contributions, if any, which may be due the Commission by any employer. All hearings shall be conducted and held at the office of the Commission and shall be open to the public and shall be stenograph-

ically reported and the Commission shall provide for the preparation of a record of all hearings and other proceedings. The Commission may provide for the taking of evidence by a deputy in which event he shall swear or cause the witnesses to be sworn and shall transmit all testimony to the Commission for its determination. From all decisions or determinations made by the Commission any party affected thereby shall be entitled to an appeal to the superior court. Before such party shall be allowed to appeal, he shall within ten days after notice of such decision or determination, file with the Commission exceptions to the decision or the determination of the Commission, which exceptions will state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled then such party may appeal from the order overruling the exceptions, and shall, within ten days after the decision overruling the exceptions, give notice of his appeal. When an exception is made to the facts as found by the Commission, the appeal shall be to the superior court in term time but the decision or determination of the Commission upon such review in the superior court shall be conclusive and binding as to all questions of fact supported by any competent evidence. When an exception is made to any rulings of law, as determined by the Commission, the appeal shall be to the judge of the superior court at chambers. The party appealing shall, within ten days after the notice of appeal has been served, file with the Commission exceptions to the decision or determination overruling the exception which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the Commission shall, within thirty days, transmit all the papers and evidence considered by it, together with the assignments of errors filed by the appellant to a judge of the superior court holding court or residing in some district in which such appellant either resides, maintains a place of business or conducts business: Provided, however, the thirty-day period specified herein may be extended by agreement of parties. If there be no exceptions to any facts as found by the Commission the facts so found shall be binding upon the court and it shall be heard by the judge at chambers at some place in the district, above mentioned, of which all parties shall have ten days' notice.

(n) The cause shall be entitled "State of North Carolina on Relationship of the Employment Security Commission of North Carolina against (here insert name of appellant)," and if there are exceptions to any facts found by the Commission it shall be placed on the civil issue docket of such court and shall have precedence over other civil actions except those described in § 96-10 (b), and such cause shall be tried under such rules and regulations as are prescribed for the trial of other civil causes. By consent of all parties the appeal may be held and determined at chambers before any judge of a district in which the appellant either resides, maintains a place of business or conducts business, or said appeal may be heard before any judge holding court therein, or in any district in which the appellant either resides, maintains a place of business or conducts business. Either party may appeal to the Supreme Court from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that if an appeal shall be taken on behalf of the Employment Security Commission of North Carolina it shall not be required to give any undertaking or make any deposit to secure the cost of such appeal and such court may advance the cause on its docket so as to give the same a speedy hearing.

(o) The decision or determination of the Commission when docketed in the office of the clerk of the superior court of any county and when properly indexed and cross-indexed shall have the same force and effect as a judgment rendered by the superior court, and if it shall be adjudged in the decision or determination of the Commission that any employer is indebted to the Commission for contributions, penalties and interest or either of the same, then said judgment shall constitute a lien upon any realty owned by said employer in the county only from the date of docketing of such decision or determination in the office of the clerk

of the superior court and upon personalty owned by said employer in said county only from the date of levy on such personalty, and upon the execution thereon no homestead or personal property exemptions shall be allowed; provided, that nothing herein shall affect any rights accruing to the Commission under § 96-10. The provisions of this section, however, shall not have the effect of releasing any liens for contributions, penalties or interest, or either of the same, imposed by other law, nor shall they have the effect of postponing the payment of said contributions, penalties or interest, or depriving the said Employment Security Commission of North Carolina of any priority in order of payment provided in any other statute under which payment of the said contributions, penalties and interest or either of the same may be required. The superior court or any appellate court shall have full power and authority to issue any and all executions, orders. decrees, or writs that may be necessary to carry out the terms of said decision or determination of the Commission or to collect any amount of contribution, penalty or interest adjudged to be due the Commission by said decision or determi-In case of an appeal from any decision or determination of the Commission to the superior court or from any judgment of the superior court to the Supreme Court all proceedings to enforce said judgment, decision, or determination shall be stayed until final determination of such appeal but no proceedings for the collection of any amount of contribution, penalty or interest due on same shall be suspended or staved unless the employer or party adjudged to pay the same shall file with the clerk of the superior court a bond in such amount not exceeding double the amount of contribution, penalty, interest or amount due and with such sureties as the clerk of the superior court deems necessary conditioned upon the payment of the contribution, penalty, interest or amount due when the appeal shall be finally decided or terminated.

(p) The conduct of hearings shall be governed by suitable rules and regulations established by the Commission. The manner in which appeals and hearings shall be presented and conducted before the Commission shall be governed by suitable rules and regulations established by it. The Commission shall not be bound by common-law or statutory rules of evidence or by technical or formal rules of procedure but shall conduct hearings in such manner as to ascertain the

substantial rights of the parties.

- (q) All subpoenas for witnesses to appear before the Commission, and all notices to employing units, employers, persons, firms, or corporations shall be issued by the Commission or its secretary; all such subpoenas shall be directed to any sheriff, constable, or to the marshal of any city or town, who shall execute the same and make due return thereof, as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court; all such notices to employing units, employers, persons, firms, or corporations shall be served by mailing to the last known address of such employing units, employers, persons, firms, or corporations, by registered mail with a return receipt requested, a copy of such notice at least ten days prior to the date of the scheduled hearing. Such notice shall set forth the hour, date, place, and purpose of the hearing. Any such return receipt issued by the postal authorities, signed by such employing units, employers, persons, firms, or corporations, shall be prima facie evidence of the service of such notice. All bonds or undertakings required to be given for the purpose of suspending or staying execution shall be payable to the Employment Security Commission of North Carolina, and may be sued on as are other undertakings which are payable to the State.
- (r) None of the provisions or sections herein set forth in subsections (m)-(q) shall have the force and effect nor shall the same be construed or interpreted as repealing any of the provisions of § 96-15 which provide for the procedure and determination of all claims for benefits and such claims for benefits shall be prosecuted and determined as provided by said § 96-15. (Ex. Sess. 1936, c. 1, s. 11; 1939, c. 2; c. 27, s. 8; c. 52, s. 5; cc. 207, 209; 1941, c. 279, ss. 4, 5; 1943, c. 377, ss.

16-23; 1945, c. 522, ss. 1-3; 1947, c. 326, ss. 1, 3, 4, 26; c. 598, ss. 1, 6, 7; 1949, c. 424, s. 1.)

Editor's Note.—The 1939 amendments inserted a proviso in subsection (d), added the last sentence and proviso to subsection (g), inserted the second sentence in subsection (k) and added subsections (m)-(r). The 1941 amendment made changes in subsections (a) and (e). Prior to the amendments subsection (e) provided also for a State Advisory Council.

The 1943 amendment inserted in the fifth sentence of subsection (a) the words "including the authority to conduct hearings and make decisions and determinations." Prior to the amendment the first clause of the sixth sentence read: "Not later than the first day of February of each year." The amendment substituted in said sixth sentence the word "biennium" for the words "calendar year." It changed "annual" in subsection (c) to "biennial," and omitted the former proviso to the second sentence of subsection (d) which had been inserted by the 1939 amendment. Prior to the amendment subsection (e) provided for local advisory councils appointed by the Commission. The amendment inserted the fifth sentence of subsection (g), added the third paragraph of subsection (k) and rewrote subsection (1). It also omitted the words "if it is in his power so to do" formerly appearing after the word "records" in the second sentence of subsection (i).

The 1945 amendment made changes in subsection (i), added the next to the last paragraph of subsection (k), struck out the word "benefit" in the catchline of subsection (1) and added to paragraph (1) of said subsection the three subparagraphs (E), (F) and (G).

The 1947 amendments added paragraph (2) to subsection (g), the last paragraph of subsection (k) and subparagraph (H) of subsection (l) (1); changed the next to the last sentence in subsection (m) and added the proviso thereto; rewrote subsection (q); substituted "Social Security Administration" for "Social Security Board" in the first paragraph of subsection (k) and substituted "Employment Security Commission" for "Unemployment Compensation Commission" in subsections (n) and (o).

The 1949 amendment deleted the words "and the actual earnings thereon" formerly appearing after the word "contributions" near the end of subparagraph (D) of paragraph (1) of subsection (1).

Authority of Chairman of Commission.

—By subsection (a) of this section the chairman of the Employment Security Commission, except as otherwise provided by the Commission, is vested with all authority of the Commission, including authority to conduct hearings and make decisions when the Commission is not in session. State v. Roberts, 230 N. C. 262, 52 S. E. (2d) 890 (1949).

Merits of Labor Disputes.—The Commission is charged with administering the benefits provided in this chapter in accordance with the objective standards and criteria set up in the chapter, but the merits of labor disputes do not belong to the Commission, these being matters properly pertaining to the field of labor relations. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941).

The Commission is made a fact-finding body under this section. The finding of facts is one of its primary duties and it is the accepted rule that when the facts are found they are, when supported by competent evidence, conclusive on appeal and not subject to review by the superior court or by the Supreme Court. Graham v. Wall. 220 N. C. 84, 16 S. E. (2d) 691 (1941).

Conclusiveness of Findings of Fact on Review.—The findings of fact of the Employment Security Commission are conclusive upon review when there is any competent evidence or reasonable inference from such evidence to support them. State v. Champion Distributing Co., 230 N. C. 464, 53 S. E. (2d) 674 (1949).

464, 53 S. E. (2d) 674 (1949).

Findings of fact by the Commission as to the eligibility of a claimant to benefits under this chapter are conclusive when supported by any competent evidence. State v. Roberts, 230 N. C. 262, 52 S. E. (2d) 890 (1949).

Scope of Review in Superior Court.—The mandatory provisions in subsection (m) of this section are controlling, and the trial in the superior court on appeal must be subject to the limitation that the decision or determination of the Commission upon such review in the superior court "shall be conclusive and binding as to all questions of fact supported by any competent evidence." State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

When, in a proceeding under this chapter to determine the liability of a defendant for taxation as an employer, exceptions are taken to the findings of fact made by the Commission in accordance with the

procedure prescribed, defendant is not entitled to a trial de novo of the issues raised by his exceptions. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E.

(2d) 4 (1941).

Right of Jury Trial Not Infringed.—The provisions of this section that the Commission's findings of fact in a proceeding before it should be conclusive on appeal when supported by competent evidence is constitutional, and objection thereto on the ground that it deprives a defendant of his right to trial by jury is untenable, since the provision relates to the administrations of a tax law and the machinery for the collection of taxes, and further, since in addition to the remedy of appeal from the decision of the Commission, the statute provides that a defendant may pay the tax under protest and sue for its recovery. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

Appeal by Commission from Judgment of Superior Court.-The Commission is not entitled to appeal from a judgment of the superior court that the employer does not come within this chapter, entered in a proceeding by an employee for compensation; and where the Commission desired to have the liability of an employer for unemployment compensation contribution judicially determined on its contentions that the employer and another concern controlled by the same interests constituted but a single employing unit, it was held that it must follow the procedure pre-scribed by § 96-10. In re Mitchell, 220 N. C. 65, 16 S. E. (2d) 476, 142 A. L. R. 931 (1941).

Cited in Unemployment Compensation Comm. v. National Life Ins. Co., 219 N. C. 576, 14 S. E. (2d) 689, 139 A. L. R. 895 (1941); Raynor v. Commissioners, 220 N. C. 348, 17 S. E. (2d) 495 (1941).

Special Administration Fund.—(a) § 96-5. Employment Security Fund.—There is hereby created in the State treasury a special fund to be known as the Employment Security Administration Fund. All moneys which are deposited or paid into this fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this chapter, and shall not lapse at any time or be transferred to any other fund. The Employment Security Administration Fund, except as otherwise provided in this chapter, shall be subject to the provisions of the Executive Budget Act (§ 143-1 et seq.) and the Personnel Act (§ 143-35 et seq.). All moneys in this fund which are received from the federal government or any agency thereof or which are appropriated by this State for the purpose described in § 96-20 shall be expended solely for the purposes and in the amounts found necessary by the Social Security Administration for the proper and efficient administration of this chapter. The fund shall consist of all moneys appropriated by this State, all moneys received from the United States of America, or any agency thereof, including the Social Security Administration, and all moneys received from any other source for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the Employment Security Administration Fund or by reason of damage to equipment or supplies purchased from moneys in such fund, and any proceeds realized from the sale or disposition of any such equipment or supplies which may no longer be necessary for the proper administration of this chapter: Provided, any interest collected on contributions and/or penalties collected pursuant to this chapter subsequent to June 30th, 1947, shall be paid into the Special Employment Security Administration Fund created by subsection (c) of this section. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Employment Security Administration Fund provided for under this chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which

may be given in the future. All sums recovered on any surety bond for losses sustained by the Employment Security Administration Fund shall be deposited in said fund.

- (b) Replacement of Funds Lost or Improperly Expended.—If any moneys received after June 30th, 1941, from the Social Security Administration under Title III of the Social Security Act, or any unencumbered balances in the Employment Security Administration Fund as of that date, or any moneys granted after that date to this State pursuant to the provisions of the Wagner-Peyser Act, or any moneys made available by this State or its political subdivisions and matched by such moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, are found by the Social Security Administration, because of any action or contingency, to have been lost or expended for purposes other than, or in amounts in excess of those found necessary by the Social Security Administration for the proper administration of this chapter, it is the policy of this State that such moneys, not available from the Special Employment Security Administration Fund established by subsection (c) of this section, shall be replaced by moneys appropriated for such purpose from the general funds of this State to the Employment Security Administration Fund for expenditure as provided in subsection (a) of this section. Upon receipt of notice of such a finding by the Social Security Administration, the Commission shall promptly pay from the Special Employment Security Administration Fund such sum if available in such fund; if not available, it shall promptly report the amount required for such replacement to the Governor and the Governor shall, at the earliest opportunity, submit to the legislature a request for the appropriation of such amount. This subsection shall not be construed to relieve this State of its obligation with respect to funds received prior to July 1st, 1941, pursuant to the provisions of Title III of the Social Security Act.
- (c) There is hereby created in the State treasury a special fund to be known as the Special Employment Security Administration Fund. All interest and penalties, regardless of when the same became payable, collected from employers under the provisions of this chapter subsequent to June 30th, 1947, shall be paid into this fund. No part of said fund shall be expended or available for expenditure in lieu of federal funds made available to the Commission for the administration of this chapter. Said fund shall be used by the Commission for the payment of costs and charges of administration which are found by the Social Security Administration not to be proper and valid charges payable out of any funds in the Employment Security Administration Fund received from any source. Refunds of interest allowable under § 96-10, subsection (e) shall be made from this special fund: Provided, such interest was deposited in said fund: Provided further, that in those cases where an employer takes credit for a previous overpayment of interest on contributions due by such employer pursuant to § 96-10, subsection (e), that the amount of such credit taken for such overpayment of interest shall be reimbursed to the Unemployment Compensation Fund from the Special Employment Security Administration Fund. The Special Employment Security Administration Fund, except as otherwise provided in this chapter, shall be subject to the provisions of the Executive Budget Act (§ 143-1 et seq.) and the Personnel Act (§ 143-35 et seq.). All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Special Employment Security Administration Fund provided for under this chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which

may be given in the future. All sums recovered on any surety bond for losses sustained by the Special Employment Security Administration Fund shall be deposited in said fund. The moneys in the Special Employment Security Administration Fund shall be continuously available to the Commission for ex-

penditure in accordance with the provisions of this section.

(d) The other provisions of this section and § 96-6, to the contrary not-withstanding, the Commission is authorized to requisition and receive from its account in the unemployment trust fund in the treasury of the United States of America, in the manner permitted by federal law, such moneys standing to its credit in such fund, as are permitted by federal law to be used for expense of administering this chapter and to expend such moneys for such purpose, without regard to a determination of necessity by a federal agency. The State Treasurer shall be treasurer and custodian of the amounts of money so requisitioned. Such moneys shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as are provided by law for other special funds in the State treasury. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, ss. 12, 13; 1947, c. 326, s. 5; c. 598, s. 1; 1949, c. 424, s. 2.)

Editor's Note.—The 1947 amendments The 1949 amendment added subsec-

rewrote paragraphs (a) and (b) and added tion (d). paragraph (c).

§ 96-6. Unemployment Compensation Fund.—(a) Establishment and Control.—There is hereby established as a special fund, separate and apart from all public moneys or funds of this State, an Unemployment Compensation Fund, which shall be administered by the Commission exclusively for the purposes of this chapter. This fund shall consist of:

(1) All contributions collected under this chapter, together with any interest

earned upon any moneys in the fund;

(2) Any property or securities acquired through the use of moneys belonging to the fund;

(3) All earnings of such property or securities;

(4) Any moneys received from the federal unemployment account in the unemployment trust fund in accordance with Title XII of the Social Security Act as amended.

All moneys in the fund shall be mingled and undivided, except that within the Unemployment Compensation Fund "reserve accounts" and a "partially pooled account" shall be maintained as provided in § 96-9. To the "reserve accounts" established under § 96-9 shall be credited such portion of the contributions computed as provided in § 96-9, and the "partially pooled account" to be credited with the balance of such contributions paid as well as the remaining portions and additions thereto of the Unemployment Compensation Fund which have not heretofore been set aside as employer "reserve accounts" within the fund under prior amendments to this chapter. Provided, however, that the "partially pooled account" established hereunder and the "reserve accounts of employer," as defined by section one (a) of the Railroad Unemployment Insurance Act, shall be subject to such withdrawals and transfers as are provided for by this section.

(b) Accounts and Deposit.—The State Treasurer shall be ex officio the treasurer and custodian of the fund who shall disburse such fund in accordance with the directions of the Commission and in accordance with such regulations as the Commission shall prescribe. He shall maintain within the fund three separate accounts: (1) a clearing account, (2) an unemployment trust fund account, and (3) a benefit account. All moneys payable to the fund, upon receipt thereof by the Commission, shall be forwarded immediately to the treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to § 96-10 may be paid from the clearing account upon warrants issued upon the treasurer by the State Auditor under the requisition of the Commission.

After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the Secretary of the Treasury of the United States of America to the credit of the account of this State in the unemployment trust fund, established and maintained pursuant to section nine hundred and four of the Social Security Act, as amended, any provision of law in this State relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this State to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this State's account in the unemployment trust fund. Moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the Commission, in any bank or public depository in which general funds of the State may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. The treasurer shall give a separate bond, conditioned upon the faithful performance of those duties as custodian of the fund, in an amount fixed by the Commission and in a form prescribed by law or approved by the Attorney General. Premiums for said bond shall be paid from the administration fund.

- (c) Withdrawals.—Moneys shall be requisitioned from this State's account in the unemployment trust fund solely for the payment of benefits and in accordance with regulations prescribed by the Commission. The Commission shall, from time to time, requisition from the unemployment trust fund such amounts, not exceeding the accounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and shall pay all warrants drawn thereon by the State Auditor requisitioned by the Commission for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to approval of the Budget Bureau or any provisions of law requiring specific appropriations or other formal release by State officers of money in their custody. All warrants issued upon the treasurer for the payment of benefits and refunds shall bear the signature of the State Auditor, as requisitioned by a member of the Commission or its duly authorized agent for that purpose. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the Commission, shall be redeposited with the Secretary of the Treasury of the United States of America, to the credit of this State's account in the unemployment trust fund, as provided in subsection (b) of this section.
- (d) Management of Funds upon Discontinuance of Unemployment Trust Fund.—The provisions of subsections (a), (b), and (c), to the extent that they relate to the unemployment trust fund, shall be operative only so long as such unemployment trust fund continues to exist, and so long as the Secretary of the Treasury of the United States of America continues to maintain for this State a separate book account of all funds deposited therein by this State for benefit purposes, together with this State's proportionate share of the earnings of such unemployment trust fund, from which no other state is permitted to make withdrawals. If and when such unemployment trust fund ceases to exist, or such separate book account is no longer maintained, all moneys, properties, or securities therein belonging to the Unemployment Compensation Fund of this State shall be transferred to the treasurer of the Unemployment Compensation Fund, who shall hold, invest, transfer, sell, deposit, and release such moneys, properties, or securities in a manner approved by the Commission, in accordance with the provisions of this chapter: Provided, that such moneys shall be invested in the following readily marketable classes of securities: Bonds or other interest-bearing obligations of the United States of America or such investments as are

now permitted by law for sinking funds of the State of North Carolina; and provided further, that such investment shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The treasurer shall dispose of securities or other properties belonging to the Unemployment Compensation Fund only under the direction of the Commission.

(e) Benefits shall be deemed to be due and payable under this chapter only to the extent provided in this chapter and to the extent that moneys are available therefor to the credit of the Unemployment Compensation Fund, and neither the State nor the Commission shall be liable for any amount in excess of such sums. (Ex. Sess. 1936, c. 1, ss. 9, 18; 1939, c. 27, s. 7; c. 52, s. 4; c. 208; 1941, c. 108: 1945, c. 522, s. 4: 1947, c. 326, s. 6.)

Editor's Note.—The 1941 amendment added that part of subsection (a) beginning with the word "except" near the beginning of the last paragraph. The amendond sentence of subsection (a), and the ment took no notice of Public Laws

1939, c. 27, s. 7, which had added somewhat similar provisions at the same place.

1947 amendment rewrote the sentence.

96-7. Representation in court.—(a) In any civil action to enforce the provisions of this chapter, the Commission and the State may be represented by any qualified attorney who is designated by it for this purpose.

(b) All criminal actions for violation of any provision of this chapter, or of any rules or regulations issued pursuant thereto, shall be prosecuted as now provided by law by the solicitor or by the prosecuting attorney of any county or city in which the violation occurs. (Ex. Sess. 1936, c. 1, s. 17; 1937, c. 150.)

Editor's Note. - The 1937 amendment attorney be a regular salaried employee of omitted the former requirement that the the Commission.

ARTICLE 2.

Unemployment Compensation Division.

§ 96-8. Definitions.—As used in this chapter, unless the context clearly

requires otherwise:

(a) (1) The term "year" as used in § 96-9, subsection (b), paragraph (4), subparagraph (A), (except when preceded by the word "calendar" or by the word "payroll") means the twelve months' period ending on July 31st of any calendar year.

(2) The term "payroll year" as used in § 96-9, subsection (b), paragraph (4), subparagraph (A) means the twelve calendar months ending on June 30th of

any calendar year.

(b) "Benefits" means the money payments payable to an individual, as pro-

vided in this chapter, with respect to his unemployment.

(c) "Commission" means the Employment Security Commission established by this chapter.

(d) "Contributions" means the money payments to the State Unemployment

Compensation Fund required by this chapter.

(e) "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person which has, on or subsequent to January first, one thousand nine hundred and thirty-six, had in its employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this chapter. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit

shall be deemed to be employed by such employing unit for all the purposes of this chapter, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work: Provided, however, that nothing herein, on or after July first, one thousand nine hundred thirty-nine, shall be construed to apply to that part of the business of such "employers" as may come within the meaning of that term as it is defined in section one (a) of the Railroad Unemployment Insurance Act.

- (f) "Employer" means (1) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has, or had in employment, eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week): Provided, for the purpose of this subsection, when a calendar week falls partly within each of two calendar years, such week shall be deemed to be within the calendar year within which such week ends: Provided further, that for purposes of this subsection "employment" shall include services which would constitute "employment" but for the fact that such services are deemed to be performed entirely within another state pursuant to an election under an arrangement entered into by the Commission pursuant to subsection (1) of § 96-4, and an agency charged with the administration of any other state or federal employment security law.
- (2) Any employing unit which acquired the organization, trade or business or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this chapter, or which acquired a part of the organization, trade, or business of another, which at the time of such acquisition was an employer subject to this chapter; provided, such other would have been an employer under paragraph (1) of this subsection, if such part had constituted its entire organization, trade, or business; provided further, that § 96-10, subsection (d), shall not be applicable to an individual or employing unit acquiring such part of the organization, trade, or business. The provisions of § 96-11 (a), to the contrary notwithstanding, any employing unit which becomes an employer solely by virtue of the provisions of this paragraph shall not be liable for contributions based on wages paid or payable to individuals with respect to employment performed by such individuals for such employing unit prior to the date of acquisition of the organization, trade, business, or a part thereof as specified herein, or substantially all the assets of another, which at the time of such acquisition was an employer subject to this chapter. This provision shall not be applicable with respect to any employing unit which is an employer by reason of any other provision of this chapter. The provisions of this paragraph shall not be applicable if the successor within sixty days from the date of the acquisition of the organization, trade, or business, or substantially all the assets of the predecessor, or a part thereof as provided herein, files a written request with the Commission to be relieved from the provisions of this paragraph, and the Commission finds the predecessor was an employer at the time of such acquisition only because such predecessor had failed to make application for termination of coverage as provided in § 96-11 of this chapter.
- (3) Any employing unit which acquired the organization, trade, or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection.

(4) Any employing unit which, having become an employer under paragraphs (1), (2), or (3), has not, under § 96-11, ceased to be an employer subject to this chapter; or

(5) For the effective period of its election pursuant to § 96-11 (c) any other employing unit which has elected to become fully subject to this chapter.

(6) Any employing unit not an employer by reason of any other paragraph of this subsection, for which, within any calendar year, services in employment are or were performed with respect to which such employing unit is or was liable for any federal tax against which credit may or could have been taken for contributions required to be paid into a State Unemployment Compensation Fund; provided, that such employer, notwithstanding the provisions of § 96-11, shall cease to be subject to the provisions of this chapter during any calendar year if the Commission finds that during such period the employer was not subject to the provisions of the Federal Unemployment Tax Act and any other provision of this chapter.

(7) Any employing unit with its principal place of business located outside of the State of North Carolina, which engages in business within the State of North Carolina, and which, during any period of twelve consecutive months, has in employment eight or more individuals in as many as twenty different weeks shall be deemed to be an employer and subject to the other provisions of this

chapter

(8) Any employing unit which maintains an operating office within this State from which the operations of an American vessel operating on navigable waters within or within and without the United States are ordinarily and regularly supervised, managed, directed, and controlled: Provided, the employing unit would be an employer by reason of any other paragraph of this subsection.

- (g) (1) "Employment" means service performed prior to January 1, 1949, which was employment as defined in this chapter prior to such date, and any service performed after December 31, 1948, including service in interstate commerce, except employment as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.
- (2) 'The term "employment" shall include an individual's entire service, performed within or both within and without this State if:

(A) The service is localized in this State; or

- (B) The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.
- (3) Services performed within this State but not covered under paragraph (2) of this subsection shall be deemed to be employment subject to this chapter, if contributions are not required and paid with respect to such services under an employment security law of any other state or of the federal government.
- (4) Services not covered under paragraph (2) of this subsection, and performed entirely without this State, with respect to no part of which contributions are required and paid under an employment security law of any other state or of the federal government, shall be deemed to be employment subject to this chapter if the individual performing such service is a resident of this State and the Commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this chapter, and services covered by an election duly ap-

proved by the Commission in accordance with an arrangement pursuant to subsection (1) of § 96-4 shall be deemed to be employment during the effective period of such election.

(5) Service shall be deemed to be localized within a state if (A) The service is performed entirely within such state; or

(B) The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the State; for example, is temporary or transitory in nature or consists of isolated transactions.

(6) The term "employment" shall include:

(A) Services covered by an election pursuant to § 96-11, subsection (c), of this chapter; and

(B) Services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to § 96-4, subsection (1), of this chapter during the effective period of such election.

(C) Any service of whatever nature performed by an individual for an emploving unit on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if such individual is employed on and in connection with such vessel when outside the United States: Provided, such service is performed on or in connection with the operations of an American vessel operating on navigable waters within or within and without the United States and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State: Provided further, that this subparagraph shall not be applicable to those services excluded in subsection (g), paragraph (7), subparagraph (F) of this section.

(7) The term "employment" shall not include:

- (A) Service performed in the employ of this State, or of any political subdivision thereof, or of any instrumentality of this State or its political subdivisions:
- (B) Service performed in the employ of any other state or its political subdivisions, or of the United States government, or of an instrumentality of any other state or states or their political subdivisions or of the United States. From and after March 10, 1941, service performed in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this chapter, except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state employment security law, all of the provisions of this chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services: Provided, that if this State shall not be certified for any year by the Social Security Administration under section one thousand six hundred and three (c) of the Federal Internal Revenue Code, the payments required of such instrumentalities with respect to such year shall be refunded by the Commission from the fund in the same manner and within the same period as is provided in § 96-10 (e) with respect to contributions erroneously collected.
- (C) Service with respect to which unemployment compensation is payable under an employment security system established by an act of Congress: Provided, that the Commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective ten days after publication thereof in the manner provided in § 96-4 (b) for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this

chapter, acquired rights to unemployment compensation under act of Congress, or who have, after acquiring potential rights to unemployment compensation under such act of Congress, acquired rights to benefits under this chapter;

(D) Agricultural labor;

(E) Domestic service in a private home;

(E) Service performed on or in connection with a vessel not an American vessel by an individual, if the individual is performing service on and in connection with such vessel when outside the United States; or, service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except (i) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (ii) service performed on or in connection with a vessel of more than ten net tons (determined in the manner provided for determining the registered tonnage of merchant vessels under the laws of the United States).

(G) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the

employ of his father or mother;

(H) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(I) Service performed on and after March 10, 1941, by an individual for an employing unit or an employer as an insurance agent or as an insurance solicitor or as a securities salesman if all such service performed by such individual for such employing unit or employer is performed for remuneration

solely by way of commission;

(J) From and after March 10, 1941, service performed in any calendar quarter by any officer, individual or committeeman of any building and loan association organized under the laws of this State, or any federal savings and loan association, where the remuneration for such service does not exceed forty-five dollars in any calendar quarter;

(K) From and after March 10, 1941, service in connection with the collection of dues or premiums for a fraternal benefit society, order or association performed away from the home office, or its ritualistic service in connection with

any such society, order or association;

(L) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery

or distribution to any point for subsequent delivery or distribution.

(M) Except as provided in paragraph (1) of subsection (f) of this section, service covered by an election duly approved by the agency charged with the administration of any other state or federal employment security law in accordance with an arrangement pursuant to subsection (1) of § 96-4 during the effective period of such election.

(N) Notwithstanding any of the other provisions of this subsection, services shall be deemed to be in employment if with respect to such services a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund.

(O) Casual labor not in the course of the employing unit's trade or business.

(P) The term "employment" shall not include services performed in the employ of any nationally recognized veterans' organization chartered by the Congress of the United States.

(h) "Employment office" means a free public employment office, or branch thereof, operated by this State or maintained as a part of a State-controlled system of public employment offices.

(i) "Fund" means the Unemployment Compensation Fund established by this chapter, to which all contributions required and from which all benefits pro-

vided under this chapter shall be paid.

(j) "State" includes, in addition to the states of the United States of America, Alaska, Hawaii, and the District of Columbia.

(k) "Total and partial unemployment."

- (1) An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to him and during which he performs no services.
- (2) An individual shall be deemed "partially unemployed" in any week in which, because of lack of work, he worked less than sixty per cent of the customary scheduled full time hours of the industry or plant in which he is employed, and with respect to which the wages payable to him are less than his weekly benefit amount plus two dollars (\$2.00): Provided, however, that the Commission may find the customary scheduled full time hours of any individual to be less or more than the customary scheduled full time hours of the industry or plant in which he is employed, if such individual customarily performs services in an occupation which requires that he customarily work a greater or smaller number of hours than the customary scheduled full time hours of the industry or plant in which he is employed.

(3) An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the Commission

may by regulation otherwise prescribe.

- (1) "Employment Security Administration Fund" means the Employment Security Administration Fund established by this chapter, from which administrative expenses under this chapter shall be paid.
- (m) From and after March 10, 1941, "wages" means all remuneration for services from whatever source: Provided, that from and after March 18, 1947, wages shall not include, and no contributions shall be paid on that part of wages earned by an individual in this State, which, when added to wages previously earned by such individual in another state or states, exceeds the sum of three thousand dollars (\$3,000.00), and the employer has paid contributions to such other state or states on the wages earned therein by such individual during the calendar year applicable. This provision shall be applicable only to wages earned by such individual in the employ of one and the same employer.
- (n) From and after March 10, 1941, "wages" shall include commissions and bonuses and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash and

The reasonable cash value of remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash, and the reasonable amount of gratuities shall be estimated and determined in accordance with rules prescribed by the Commission: Provided, if the remuneration of an individual is not based upon a fixed period or duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to unemployment benefits only shall be determined in such manner as may by authorized regulations be prescribed. Such regulations shall, so far as possible, secure results reasonably similar to those which would prevail if the individual were paid his wages at regular intervals: Provided, further, that the term "wages" shall not include the amount of any payment with respect to services performed from and after March 10, 1941, to, or on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provision for individuals in its employ generally or for a class or classes of such individuals (including any amount paid by an employing unit for insurance or annuities,

or into a fund, to provide for any such payment), on account of (A) retirement, or (B) sickness or accident disability, or (C) medical and hospitalization expenses in connection with sickness or accident disability, or (D) death: Provided further, the individual in its employ (i) has not the option to receive, instead of provision for such death benefit, any part of such payment, or, if such death benefit is insured, any part of the premiums (or contributions to premiums) paid by his employing unit, and (ii) has not the right under the provisions of the plan or system or policy of insurance providing for such death benefit, to assign such benefit, or to receive cash consideration in lieu of such benefit either upon his withdrawal from the plan or system providing for such benefit or upon termination of such plan or system or policy of insurance or of his services with such employing unit: Provided, further, wages shall not include payment by an employer without deduction from the remuneration of the employee of the tax imposed upon an employee under the Federal Insurance Contributions Act.

(o) "Week" means such period or periods of seven consecutive calendar days

ending at midnight as the Commission may by regulations prescribe.

(p) "Calendar quarter" means the period of three consecutive calendar months ending on March thirty-first, June thirtieth, September thirtieth or December thirty-first, excluding, however, any calendar quarter or portion thereof which occurs prior to January first, one thousand nine hundred and thirty-seven, or the equivalent thereof as the Commission may by regulation prescribe.

(q) "Weekly benefit amount." An individual's "weekly benefit amount" means the amount of benefits he would be entitled to receive for one week of total un-

employment.

- (r) "Benefit year" with respect to any individual means the one-year period beginning with the first day of the first week with respect to which such individual first registers for work and files a valid claim for benefits, and after the termination of such benefit year the next benefit year shall be the next one-year period beginning with the first day of the first week with respect to which such individual registers for work and files a valid claim for benefits; a valid claim shall be deemed to have been filed if such individual, at the time the claim is filed, is unemployed and has been paid wages for employment amounting to at least two hundred dollars in the applicable base period: Provided, however, that any individual whose employment under this chapter prior to July first, one thousand nine hundred and thirty-nine, shall have been for an employer subject after July first, one thousand nine hundred and thirty-nine, to the Railroad Unemployment Insurance Act and some other employer subject to this chapter, such individual's benefit year, if established before July first, one thousand nine hundred and thirty-nine, shall terminate on that date and if again unemployed after July first, one thousand nine hundred and thirty-nine, he shall establish another benefit year after such date with respect to employment subject to this chapter.
- (s) For benefit years beginning on or after February fifteenth, one thousand nine hundred thirty-nine, the term "base period" shall mean the completed calendar year immediately preceding the first day of an individual's benefit year as defined in subsection (r) of this section, if the benefit year begins subsequent to July first; and if the benefit year begins prior to July first, the base period shall be the next to the last completed calendar year, notwithstanding the fact that an otherwise eligible individual may have exhausted wage credits to his account prior to February fifteenth, one thousand nine hundred thirty-nine, for any such calendar year. Except that for weeks of unemployment of any individual after July first, one thousand nine hundred thirty-nine, who has worked in employment for an employer which after July first, one thousand nine hundred thirty-nine, is subject to the Railroad Unemployment Insurance Act, then only the wages payable to such an individual earned in employment during the base period for an employer other than one subject to the Railroad Unemployment

Insurance Act shall be used in determining his weekly benefit amount after July

first, one thousand nine hundred thirty-nine.

(t) Wages payable to an individual with respect to covered employment performed prior to January first, one thousand nine hundred and forty-one, shall, for the purpose of § 96-12 and § 96-9, be deemed to be wages paid within the calendar quarter with respect to which such wages were payable.

- (u) The term "American vessel", as used in this chapter, means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is performing service solely for one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any
- (v) The words "Employment Security Law" as used in this chapter mean any law enacted by this State or any other state or territory or by the federal government providing for the payment of unemployment compensation benefits. (Ex. Sess. 1936, c. 1, s. 19; 1937, c. 448, s. 5; 1939, c. 27, ss. 11-13; c. 52, ss. 6, 7; c. 141; 1941, cc. 108, 198; 1943, c. 377, ss. 31-34; c. 552, ss. 1, 2; 1945, c. 522, ss. 5-10; c. 531, ss. 1, 2; 1947, c. 326, ss. 7-12; c. 598, ss. 1, 5, 8; 1949, c. 424, ss. 3-8½; cc. 523, 863.)

Editor's Note.—The 1939 amendments added the proviso to subsection (e), made changes in paragraph (1) of subsection (g), and changed subsections (r) and (s).

The first 1941 amendment made changes in paragraph (1) of subsection (a) and in subsections (e) and (f); inserted the second sentence and proviso of clause (B) of paragraph (7) of subsection (g) and added clauses (I), (J) and (K) of said paragraph (7); rewrote subsections (m), (n) and (r) and added subsection (t). second 1941 amendment added clause (L) of paragraph (7) of subsection (g).

The first 1943 amendment added paragraph (6) of subsection (f), and the last clause of paragraph (4) of subsection (g) containing the reference to § 96-4. It also added the proviso and made other changes in paragraph (2) of subsection (k). Subsection (r) was also changed by the amendment. The second 1943 amendment added the proviso to paragraph (1) of subsection (f), and clauses (M) and (N) to paragraph (7) of subsection (g).

The first 1945 amendment made changes in paragraph (2) of subsection (f) and added paragraph (7) of said subsection. The amendment also made changes in subsections (g) and (k). The second 1945 amendment struck out a sentence of subsection (e) and added paragraph (8) to

subsection (f).

The 1947 amendments made substantial changes in subsection (a) and paragraph (8) of subsection (f), made changes in subsection (g), changed the name of the fund in subsection (1), added the proviso and second sentence to subsection (m), rewrote subsection (n) and added subsections (u) and (v).

The first 1949 amendment inserted the first proviso in paragraph (1) of subsection (f) and made changes in paragraph (6) thereof. It rewrote paragraph (1) of subsection (g), struck out former paragraph (6) and renumbered former paragraphs (7) and (8) as (6) and (7), respectively. The amendment also inserted in subsection (m) the words "from and after March 1947," added the last proviso to subsection (n), and increased the amount in subsection (r) from one hundred and thirty dollars to two hundred dollars. The second 1949 amendment added that part of paragraph (2) of subsection (f) beginning with the second sentence, and the third 1949 amendment added clause (P) of paragraph (7) of subsection (g).

Amendments Affecting Decisions. — In considering the cases cited below, the many changes made in this section by the amendatory acts should be borne in mind.

Definitions and Tests Applied According to Legislative Intent.-The General Assembly has power to determine scope of the Unemployment Compensation Act, and the definitions and tests therein prescribed will be applied by the courts in accordance with the legislative intent. Unemployment Compensation Comm. v. City Ice, etc., Co., 216 N. C. 6, 3 S. E. (2d) 290 (1939).

Common-Law Relationship of Master Servant Extended. — Employments taxable under this chapter are not confined to the common-law relationship of master and servant, but the legislature, under its power to determine employments which shall be subject to the tax, has, by

the definitions contained in the chapter and the administrational procedure set up therein for determining whether an employment is subject to the chapter, enlarged its coverage beyond the commonlaw definition of master and servant, and the scope of the chapter must be determined upon the facts of each particular case. Unemployment Compensation Comm. v. National Life Ins. Co., 219 N. C. 576, 14 S. E. (2d) 689, 139 A. L. R. 895 (1941). See State v. Harvey & Son Co., 227 N. C. 291, 42 S. E. (2d) 86 (1947).

This section is not violative of constitutional provisions when properly interpreted and applied. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4

(1941).

Former paragraph (4) of subsection (f) of this section, relating to employing units owned or controlled by the same interests, etc., when properly interpreted and applied, was not open to successful attack on the ground that it would result in the deprivation of property without due process of law or constitute a denial of the equal protection of the laws. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

Liberal Construction.—The terms "employment," "employer," "employing unit," "wages," and "remuneration" as used in this chapter must be liberally construed to effectuate its purpose to relieve the evils of unemployment, and the definition of the terms as contained in the chapter are controlling and are broader than the common-law meaning of the terms, and the chapter includes in its scope relationships which might be excluded by a strict common-law application of the definition of an independent contractor. Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584 (1939).

The provision that enterprises "controlled" by the same "interests" shall be considered a single employing unit, as contained in former paragraph (4) of subsection (f) of this section, was given the distinct, definite and commonly understood meaning of its wording. Unemployment Compensation Comm. v. City Ice, etc., Co., 216 N. C. 6, 3 S. E. (2d) 290 (1939).

Where the three defendant corporations had common officers and directors and substantially identical stockholders, and maintained a central business office where each kept its records and handled all clerical matters, the three corporations were owned and controlled directly or indirectly by the same interests within the meaning

of former paragraph (4) of subsection (f) of this section and constituted but a single employing unit within the meaning of the section. Unemployment Compensation Comm. v. City Ice, etc., Co., 216 N. C. 6, 3 S. E. (2d) 290 (1939).

An individual who operated three places of business, employing in the aggregate more than eight employees, was an "employer" as defined in former paragraph (4) of subsection (f) of this section, relating to employing units owned or controlled by the same interests, etc. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

Services of Insurance Soliciting Agents Constitute Employment.—Soliciting agents and managers, in their capacity as soliciting agents, are subject to a high degree of control by the insurance company employing them under their written contract, and usually their services are rendered to the company in the offices of the company, and are directly related and contribute to the primary purpose for which the company is organized, and therefore their services constitute an "employment" within this chapter. Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584 (1939). But see subsection (g) (7) (I) of this section

Former Burden of Proving Services Do Not Constitute Employment. - Where services were rendered for remuneration, subsection (g) (6) of this section formerly provided that the burden was on the party for whose benefit the services were rendered to prove that they were rendered free from his control or direction over the performance of such services, that they were outside the usual course of the business for which the services were performed, and that the person performing the service was customarily engaged in an independently established trade, occupation, profession, or business; and since the matters of exemption were stated conjunctively, all three elements were required to be shown in order that exemption from the chapter could be secured. Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584 (1939).

Before the 1949 amendment to subsection (g), paragraphs (1) and (6), it was held that the provisions of the Employment Security Law classifying and designating those persons who are subject to the provisions of this chapter, rather than the common-law definition of the relationship of master and servant, were control-

ling, when not capricious or unreasonable. And the burden was upon the employer to show to the satisfaction of the Employment Security Commission that persons performing services came within the exceptions enumerated in former paragraphs A, B and C of subsection (g) (6). State v. Champion Distributing Co., 230 N. C. 464, 53 S. E. (2d) 674 (1949).

Evidence Held to Support Finding That

Salesmen Were "Employees."—The evidence tended to show that the services performed by defendant's salesmen were in the usual course of defendant's business, that goods were loaded on the salesmen's cars on defendant's premises, and the unsold goods returned there, that the salesmen were bonded, were allotted territory by defendant, were not permitted to sell any competitor's merchandise, paid no license or sales tax, were reported as employees in federal returns and their taxes deducted from the pay roll, were required to turn in all money for goods sold and were paid weekly on a commission basis. Held: The evidence supports the finding of the Employment Security Commission that the salesmen were "employees" within the meaning of this section. State v. Champion Distributing Co., 230 N. C. 464, 53 S. E. (2d) 674 (1949). But see the 1949 amendment to subsection (g), paragraphs (1) and (6).

Determination of Liability for Contributions.—Former subsection (e) merely determined who should be liable for the contributions to the Commission on wages paid to employees as between an employing unit and a contractor or subcontractor under certain specified circumstances. State v. Nissen, 227 N. C. 216, 41 S. E. (2d) 734 (1947).

Corporation Held Contractee and Not Mere Lessor.—The corporate defendant operated a department store. Upon the discontinuance of its shoe department, it entered into a contract with the individual defendant under which he occupied space in the store at a rental of a fixed percentage of the gross and carried on the shoe business under the name of the corporation, with full authority to hire and fire employees and order stock, but under which the corporation required money from sales to be turned over to it immediately as received, controlled the extension of credit and owned all accounts, paid sales taxes and advertised in its own name

with the individual defendant paying for the proportion of advertising devoted to shoes. It was held that the corporation was a contractee and not a mere landlord, and that the corporation was liable under former subsection (e), for unemployment compensation tax on wages paid by the individual to his employees for the period of operation prior to the amendment of 1945. State v. Harvey & Son Co., 227 N. C. 291, 42 S. E. (2d) 86 (1947)

period of operation prior to the amendment of 1945. State v. Harvey & Son Co., 227 N. C. 291, 42 S. E. (2d) 86 (1947). Effect of Subsection (f) (2).—Subsection (f) (2) of this section is a definitive statute by which it can be determined whether or not an employing unit which is the transferee of all, substantially all, or a part of an organization, trade, or business of another, is subject to the provisions of the Employment Security Law and required to make the contributions as provided therein. State v. News Publishing Cc., 228 N. C. 332, 45 S. E. (2d) 391 (1947). But see the 1949 amendment to § 96-9 (c) (4).

Employing Unit Acquiring Part of Organization, Trade or Business of Another. -In subsection (f) (2) of this section, the employing unit that acquires only a part of the organization, trade, or business of another is expressly exempted from the lien imposed by § 96-10 (d) on the assets transferred, although the former owner may not have paid all the contributions due at the time of the transfer. If it had been the intent and purpose of the legislature in enacting § 96-9 (c) (4), to authorize the transfer of such percentage of the reserve account as the transferred assets bear to the entire assets of the transferor, when only a part of the organization, trade. or business is transferred, then there would be no sound reason for exempting such assets from the provisions of § 96-10 (d). State v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391 (1947). But see the 1949 amendment to § 96-9 (c) (4).

Liability of Contractor under Former Provisions.—A person who is a contractor within the meaning of paragraph (8) of subsection (f) of this section, as added by Session Laws 1945, c. 531, is liable for unemployment compensation taxes for wages paid to his employees for the period subsequent to the effective date of said chapter 531 until March 18, 1947, the effective date of the repeal of the said paragraph. State v. Harvey & Son Co., 227 N. C. 291, 42 S. E. (2d) 86 (1947).

§ 96-9. Contributions.—(a) Payment.—(1) On and after January first, one thousand nine hundred and thirty-six, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this

chapter, with respect to wages for employment (as defined in § 96-8 (g)). Such contributions shall become due and be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided that, on and after July first, one thousand nine hundred and forty-one, contributions shall be paid for each calendar quarter with respect to wages paid in such calendar quarter for employment after December thirty-first, one thousand nine hundred and forty. Contributions shall become due on and shall be paid on or before the last day of the month following the close of the calendar quarter in which such wages are paid and such contributions shall be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the Commission shall be advised by its duly authorized officers or agents that the collection of any contribution under any provision of this chapter will be jeopardized by delay, the Commission shall, whether or not the time otherwise prescribed by law for making returns and paying such tax has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by § 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.

(2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent. For the purposes of this section, the term "wages" shall not include that part of the remuneration which, after remuneration equal to \$3,000 has become payable to an individual by an employer with respect to employment during the calendar year 1940, becomes payable to such individual by such employer with respect to employment during such calendar year, and which, after remuneration equal to \$3,000 has been paid to an individual by an employer with respect to employment during the calendar year 1941, and during any calendar year thereafter, is paid to such individual by such employer with respect to employment occurring during such calendar year but after December 31, 1940: Provided, that from and after December 31st, 1946, for the purposes of this section, the term "wages" shall not include that part of remuneration in excess of three thousand dollars (\$3,000.00) paid to an individual during any calendar year for employment, irrespective of the year in which such employment occurred.

(b) Rate of Contributions.—Each employer shall pay contributions equal to the following percentages of wages payable by him with respect to employment:

(1) Nine-tenths of one percentum with respect to employment during the calendar year one thousand nine hundred and thirty-six;

(2) One and eight-tenths percentum with respect to employment during the

calendar year one thousand nine hundred and thirty-seven;

(3) Two and seven-tenths percentum with respect to employment during the calendar year one thousand nine hundred and thirty-eight, and each year thereafter: Provided, however, that each employer shall pay contributions equal to two and seven-tenths percentum of wages paid by him during the calendar year one thousand nine hundred and forty-one, and during each calendar year thereafter, with respect to employment occurring after December thirty-first, one thousand

sand nine hundred and forty, which shall be deemed the standard rate of contributions payable by each employer except as provided herein.

(4) Variations from the standard rate of contributions shall be determined

in accordance with the following requirements:

- (A) If, as of any computation date, the Commission finds that: Compensation has been payable from an employer's account throughout the year preceding the computation date; and the balance of such account amounts to not less than five times the largest amount of compensation paid from such account within any one of the three years preceding such date; and the balance of such account as of the computation date amounts to not less than two and one-half percentum of that part of the payroll or payrolls in the three payroll years preceding such date by which contributions were measured; and such contributions were payable to such account with respect to the three years preceding the computation date, contribution rates for the calendar year following such computation date shall be determined pursuant to subparagraph (B) of this subsection.
- (B) If, as of any computation date, the cumulative total of all an employer's contributions which were paid and accredited to his "reserve account" before such computation date exceeds the cumulative total benefits which were chargeable to his "reserve account" and were paid before such computation date; and if such excess of contributions over benefits paid and chargeable to such account equals that percentage of his wages by which contributions were measured during the thirty-six consecutive calendar-month period ending June thirtieth preceding such computation date, which percentage is shown in Column 1 of the table below, and is less than the percentage opposite thereto in Column 2 of the table below, his contribution rate in the ensuing calendar year beginning on or after January 1, 1949, shall be equal to that percentum of the wages paid for employment by him during such ensuing year, which is shown in Column 3 of the table below. Of the payments so made, there shall be credited to the partially pooled account the percentage of wages for employment paid by him during such calendar years which is shown opposite thereto in Column 4 of the table below, and there shall be credited to the "reserve account" of the employer that percentage of the wages for employment paid by him during such calendar year, which is shown opposite thereto in Column 5 of the table below:

Column 1 As much as but	Column 2 Less than	Column 3 Rate of Contrib.	Column 4 Cr. Pool Account	Column 5 Credit Re- serve Account
	2.5%	2.70%	.10%	2.60%
2.5%	2.8	2.00	.10	1.90
2.8	3.1	1.50	.10	1.40
3.1	3.4	1.00	.10	.90
3.4	3.8	.80	.10	.70
3.8	4.2	.60	.10	.50
4.2	4.6	.40	.10	.30
4.6	5.	.20	.10	.10
6 & in excess the	ereof	.10	.10	0

⁽C) The computation date for any contribution rates shall be August first of the calendar year preceding the calendar year with respect to which such rates are effective.

⁽D) Should the Commission be of the opinion that the balance to the credit of the "partially pooled account" is insufficient to provide adequate security in the payment of all compensation to all eligible individuals, it shall direct such fact to the attention of the Council of State, and, upon finding of the Council that such a situation exists and a declaration that emergency steps are advisable, the

Commission is hereby authorized and empowered to require the payment by all employers of as much as 60% of the standard rate to be credited entirely to the "partially pooled account," and if such additional credit to the "partially pooled account" as required by this section exceeds the rate for any employer as fixed under § 96-9 (b), (4), (B), his rate shall be such percentage of the standard rate with no credit to his reserve account. If the additional credit to the "partially pooled account" as required by this subsection is less than the standard rate or rate for any employer as fixed under § 96-9 (b), (4), (B), such employer shall pay the standard rate or the rate of contributions as provided in § 96-9 (b), (4), (B) and his reserve account be credited with the balance of payment after crediting the "partially pooled account" with the additional credit as provided in this subsection. Any increased contribution rate thus required by the Commission shall be applicable with respect to contributions on wages paid during the quarter in which such finding of the Council of State occurred, and shall continue to be applicable with respect to contributions on wages paid up to the last day of the calendar quarter preceding the quarter in which, upon recommendation by the Commission, the Council of State shall find that the balance to the credit of the "partially pooled account" is sufficient to provide adequate security for the payment of all compensation to all eligible individuals.

(E) Any employer may at any time make voluntary contributions, additional to the contributions required under this chapter, to the fund to be credited to his reserve account and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as said term is used in § 96-8 (i). Any voluntary contributions so made by an employer within ten days after the date of mailing of statement of charges to the reserve account of such employer for the previous quarter ending July 31st, shall be credited to the reserve account as of July 31st of such quarter: Provided, such notice of charges shall be mailed to the employer prior to December 1st of such year. The Commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of such voluntary contribution by any

employer.

(F) If within the calendar month next following the computation date, the Commission finds that any employing unit failed to file any report required in connection therewith, or has filed a report which the Commission finds incorrect or insufficient, the Commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time, and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report as the case may be, within fifteen days after the mailing of such notice, the Commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis

of subsequently ascertained information.

(c) (1) The Commission shall maintain a separate fiscal account for each employer and shall credit his account with all the contributions which he has paid or is paid on his own behalf. On and after January 1, 1939, the Commission shall establish and maintain an employer's "reserve account" for each employer subject to this chapter, to which account the Commission shall credit out of the Unemployment Compensation Fund an amount equal to fifty percent of the contributions paid by such employers pursuant to § 96-9 (b) with respect to employment during the calendar year 1938 for the purpose of paying out of such accounts compensation payable to all eligible individuals in accord with the provisions of paragraph (2) of this subsection. To these "reserve accounts" shall also be credited seventy-five per cent of all contributions paid each year pursuant to this chapter from and after January 1, 1939, the remaining twenty-five per cent of the contributions to be credited to the "partially pooled account" and for each calendar year, beginning January 1, 1941, to these "reserve accounts"

date of discovery.

shall be credited ninety percentum of all contributions paid each calendar year pursuant to this chapter, the remaining ten percentum to be credited to the "partially pooled account," except as provided in subsection (b), (4) hereof, and as hereinafter provided. Irrespective of any other provisions of this chapter, all contributions paid by an employer during a calendar year shall be credited to the reserve account of such employer if on the computation date in the preceding calendar year the funds in the partially pooled account amounted to as much as twenty-five million dollars (\$25,000,000.00), this provision to be first effective as to contributions paid on and after April 1, 1949. If the amount of funds in the partially pooled account as of the computation date is less than twenty-five million dollars (\$25,000,000,00), the reserve account of the employer shall be credited during the ensuing calendar year with the contributions paid during such calendar year less an amount equal to one-tenth of one per cent of the wages by which such contributions were measured, which one-tenth of one per cent shall be credited to the partially pooled account. that if on the computation date, beginning first with August 1, 1948, the funds in the partially pooled account amount to as much as twenty-five million dollars (\$25,000,000.00), the ratio of the credit balance in each individual reserve account to the total of all the credit balances in all employer reserve accounts shall be computed as of such computation date and an amount equal to the interest credited to this State's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar quarters shall be charged prior to the next computation date to the partially pooled account and credited on a pro rata basis to all employers' reserve accounts having a credit balance on the computation date. Such amount shall be prorated to the individual reserve accounts in the same ratio that the credit balance in each individual reserve account bears to the total of the credit balances in all such reserve accounts. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended.

(2) Charging of benefit payments.—(A) All benefits for weeks of unemployment paid during the period beginning with the last computation date and ending on July thirty-first of each year to any eligible individual shall be paid out of the reserve account of such individual's employer or employers by whom he was employed during his base period. In accordance with the regulations of the Commission, such payments shall be charged against all employers of such individual during his base period in the same ratio that the wages paid to such individual by each base period employer bears to the total wages paid him by all his employers during the base period, except as provided in subparagraph (B) of this subsection. In the event an employer's credits in his reserve account become exhausted through the payment of benefits chargeable to such account, the benefit payments which are chargeable to such account shall be paid out of the partially pooled account and at the same time the reserve account of the employer shall be debited accordingly. Whenever through inadvertence or mistake erroneous charges or credits are found to have been made to reserve accounts, the same shall be readjusted as of the date of discovery and such readjustment shall not affect any computation made under this section prior to the

(B) Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this subparagraph and based on wages earned prior to the date of (a) the voluntary leaving of work by the claimant without good cause attributable to the employer, or (b) the discharge of claimant for misconduct in connection with his work, shall not be charged to the reserve account of the employer by whom claimant was employed at the time of such separation, but any such benefits chargeable under the provisions of subparagraph (A) of this subsection to the reserve account of

benefit years following separations occurring after June 30, 1949. All benefits paid claimants during benefit years existing as of June 30, 1949, and for periods of unemployment which establish benefit years following separations occurring prior to July 1, 1949, shall be charged in accordance with the provisions of this chapter as in effect immediately prior to March 21, 1949, notwithstanding the repeal of the provisos formerly contained in § 96-14, subsections (a) and (b) of the General Statutes: Provided, however, said employer promptly furnishes the Commission with such notices regarding the separation of the individual from work as are or may be required by the regulations of the Commission.

(3) As of July 31st of each year, and prior to the effective date of any variation from standard rate of contribution, the Commission shall determine the balance of each employer in his reserve account and shall furnish him with a statement of all charges and credits thereto. At the same time the Commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files an application for review or redetermination with-

in thirty days after the effective date of such rates.

(4) Transfer of reserve account. — (A) Whenever any individual, group of individuals, or employing unit, who or which, in any manner, succeeds to or acquires substantially all or a distinct or severable portion of the organization, trade, or business of another employing unit as provided in § 96-8, subsection (f), paragraph (2), the reserve account or that part of the reserve account of the predecessor which relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition to the successor employer for use in the determination of his rate of contributions, provided that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade, or business. This provision shall not be retroactive with respect to the transfer of a part of a reserve account of the predecessor in those cases in which an employing unit succeeds to or acquires a distinct and severable portion of the organization, trade, or business of another employing unit as provided in § 96-8, subsection (f), paragraph (2), and shall apply only when the transfer of such distinct and severable portion of the organization, trade or business of another occurs after March 21, 1949.

(B) Notwithstanding any other provisions of this section, if the successor employer was an employer subject to this chapter prior to the date of acquisition, his rate of contributions for the period from such date to the end of the then current contribution year shall be the same as his rate with respect to the period immediately preceding the date of acquisition. If the successor was not an employer prior to the date of the acquisition, his rate shall be the rate applicable to the predecessor employer or employers with respect to the period immediately preceding the date of acquisition, provided there was only one predecessor, or if more than one and the predecessors had identical rates. In the event the rates of the predecessors were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers with respect to the period

immediately preceding the date of acquisition.

(5) In the event any employer subject to this chapter ceases to be such an employer, his reserve account shall be maintained for a period of five years from the termination date, and shall be charged with benefits paid to any individual based on wages paid by such employer during the individual's base period as hereinabove provided. If within such five-year period he again becomes an employer subject to this chapter, he shall be entitled to a variation from the standard rate of contributions only if thereafter the conditions specified in § 96-9 (b), (4) are met. If within such five-year period he fails to become an employer sub-

ject to this chapter the reserve account standing to the credit of such employer shall immediately revert to the partially pooled account established herein and the reserve account shall be closed.

(d) In order that the Commission shall be kept informed at all times on the circumstances and conditions of unemployment within the State and as to whether the stability of the fund is being impaired under the operation and effect of the system provided in subsection (c) of this section, the actuarial study now in progress shall be continued and such other investigations and studies of a similar nature as the Commission may deem necessary shall be made. (Ex. Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17; c. 881, s. 3; 1949, c. 424, ss. 9-13; c. 969.)

Editor's Note.—The first 1941 amendment substituted new paragraph (1) of subsection (a) and new subsections (b) and (c). It also re-enacted subsection (d) without change. The second 1941 amendment added paragraph (2) of subsection (a).

The 1943 amendment changed paragraph (1) of subsection (a) by substituting at the end of the second sentence the words "in such calendar quarter for employment after December thirty-first, one thousand nine hundred and forty" for the words "for employment in all pay periods ending within such calendar quarter." It also substituted near the beginning of the third sentence the words "last day" for the words "twenty-fifth day." The amendment changed paragraph (4) of subsection (b) by substituting "§ 96-8 (i)" for "§ 96-8 (d)," in clause (E), and by adding the second sentence of the clause. It also amended clause (F) thereof by substituting "it" for "him", and changed paragraph (4) of subsection (c).

The 1945 amendment made changes in subparagraphs (A), (B) and (C) of paragraph (4) of subsection (b), and in paragraphs (2), (3) and (4) of subsection (c).

The 1947 amendments made changes in paragraph (2) of subsection (a), in subparagraphs (A) and (E) of paragraph (4) of subsection (b) and in paragraphs (2) and (3) of subsection (c).

The 1949 amendments rewrote subparagraph (B) of paragraph (4) of subsection (b), made changes in paragraphs (1), (2) and (4) of subsection (c), and added paragraph (5) to subsection (c).

Amendments Affecting Decisions.—In considering the cases cited below, the many changes made by the amendatory acts should be borne in mind.

Contributions Constitute a Tax.—Contributions imposed on employers within the purview of this chapter are compulsory and therefore constitute a tax, and they are not rendered any less a tax by reason

of the provision that they should be segregated in a special fund for distribution in furtherance of the purpose of the chapter. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

Payment of Contributions for Calendar Year 1936 Could Not Be Required.-Since chapter 1 of Public Laws 1936 was in effect a tax upon an act or acts, and since the statute was not ratified until December 16, 1936, and the determination of "employment" within the coverage of the act was to be determined from records for the calendar year 1936, and since no benefits therefrom could be obtained by employees for the calendar year 1936, in so far as the act attempted to require the payment of contributions for the calendar year 1936, it was retroactive and void as being in conflict with Art. I, § 32, of the State Constitution. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592 (1939).

State Bank Member of Federal Reserve System Not Exempt.—A bank organized under the laws of this State is not an instrumentality of the federal government so as to exempt it from the tax imposed by this chapter, notwithstanding that the bank may be a member of the federal reserve system, since its existence and powers are derived from its State charter and its membership in the federal reserve system is voluntary and may be relinquished by it without destroying its corporate existence. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592 (1939).

A State bank which is a member of the federal reserve system is not exempt from taxation under this chapter because of its connection with the federal deposit insurance corporation nor may it claim such exemption because the tax would discriminate against it in favor of national member banks, since to relieve it from such taxation would discriminate in favor of it against nonmember State banks. Unemployment Compensation Comm. v. Wach-

ovia Bank, etc., Co., 215 N. C. 491, 2 S.

E. (2d) 592 (1939).

Contributions Are Required for Services of Insurance Soliciting Agents.—Since the services of soliciting agents and managers, in their capacity as soliciting agents, constitute "employment" within the meaning of this chapter, the insurance company for which the services are performed is liable for contributions for such employment. Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584 (1939). But see subsection (g) (7) (I) of § 96-8.

Declaratory Judgment as to Inclusion of Certain Salaries Cannot Be Obtained.—An action to determine whether salaries paid certain employees should be included in computing the contributions to be paid by an employer under the Unemployment Compensation Act involves solely an issue of fact and does not involve any right, status or legal relation, and the employer may not maintain proceedings under the Declaratory Judgment Act to determine the question. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

An action against the Unemployment Compensation Commission seeking judgment that salaries paid to certain of plaintiff's employees should not be included in computing the amount of the contributions plaintiff should pay under the Unemployment Compensation Act is an action against a State agency and directly affects the State, since the amount of tax it is entitled to collect is involved, and the action is properly dismissed upon demurrer, since there is no statutory provision authorizing such action. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

Prior to the 1949 amendment, subsection (c) (4) of this section, by its own limitation, restricted the transfer of reserve accounts to those cases where the account was to be transferred in toto; and even then, such reserve account could be transferred only to such employing unit defined in § 96-8 (f) (2), as might acquire the organization, trade, or business of another for whom a reserve account had been theretofore established and maintained. State v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391 (1947).

An employer under the Employment Security Law was engaged in the business of printing and publishing a newspaper and also the business of operating a job printing business as separate businesses with separate books. Thereafter an independent corporation was organized which took over all the assets of the job printing business and retained all the employees of that department. It was held, under subsection (c) (4) of this section as it stood before the 1949 amendment, that the new corporation was not entitled to a pro rata transfer to it of the reserve fund. State v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391 (1947).

Transfer of Reserve Credited to Particular Employer through Misapprehension.

—Paragraph 4 of subsection (c) authorizes the Commission to transfer a reserve fund only upon the mutual consent of the parties. However, the law does not apply where such reserve was credited to a particular person, firm or corporation under a misapprehension of the facts or the status of the person, firm or corporation making

the contribution. State v. Nissen, 227 N. C. 216, 41 S. E. (2d) 734 (1947).

§ 96-10. Collection of contributions.—(a) Interest on Past-Due Contributions.—Contributions unpaid on the date on which they are due and payable, as prescribed by the Commission, shall bear interest at the rate of one-half of one per centum per month from and after such date until payment plus accrued interest is received by the Commission. Interest collected pursuant to this subsection shall be paid into the Special Employment Security Administration Fund. If any employer, in good faith, pays contributions to another state or to the United States under the Federal Unemployment Tax Act, prior to a determination of liability by this Commission, which contributions were legally payable to this State, such contributions, when paid to this State, shall be deemed to have been paid by the due date under the law of this State if paid by the due date of such other state or the United States.

(b) Collection.—(1) If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the Commission, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date, and shall be entitled to preference upon

the calendar of the court over all other civil actions except petitions for judicial review under this chapter and cases arising under the Workmen's Compensation Law of this State; or, if any contribution imposed by this chapter, or any portion thereof, and/or penalties duly provided for the nonpayment thereof shall not be paid within thirty days after the same become due and payable, and after due notice and reasonable opportunity for hearing, the Commission under the hand of its chairman, may certify the same in duplicate and forward one copy thereof to the clerk of the superior court of the county in which the delinquent resides or has property, and additional copies for each county in which the Commission has reason to believe such delinquent has property located, which copy so forwarded to the clerk of the superior court shall be immediately docketed by said clerk and indexed on the cross index of judgment, and from the date of such docketing shall constitute a preferred lien upon any property which said delinquent may own in said county, with the same force and effect as a judgment rendered by the superior court; for docketing said certificate and indexing same as above set forth, the clerks of superior courts shall charge a fee of one dollar (\$1.00), which shall be in lieu of any other fee chargeable under the General Statutes of North Carolina or any Public-Local or Private Act. The duplicate of said certificate shall be forwarded by the Commission to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the Commission, and in the hands of such sheriff or agent of the Commission shall have all the force and effect of an execution issued to such sheriff or agent of the Commission by the clerk of the superior court upon the judgment of the superior court duly docketed in said county. Provided, however, that notwithstanding any provision of this subsection, upon filing one written notice with the Commission the sheriff of any county shall have the sole and exclusive right to serve all executions and make all collections mentioned in this subsection and in such case no agent of the Commission shall have the authority to serve any executions or make any collections therein in such county. A return of such execution shall be made to the Commission, together with all moneys collected thereunder, and when such order or execution is referred to the agent of the Commission for service the said agent of the Commission shall be vested with all the powers of the sheriff to the extent of serving such order or execution and levying or collecting thereunder. The agent of the Commission to whom such order or execution is referred shall give a bond not to exceed three thousand dollars (\$3,000.00) approved by the Commission for the faithful performance of such duties. The liability of said agent shall be in the same manner and to the same extent as is now imposed on sheriffs in the service of executions. If any sheriff of this State or any agent of the Commission who is charged with the duty of serving executions shall willfully fail, refuse, or neglect to execute any order directed to him by the said Commission and within the time provided by law, the official bond of such sheriff or of such agent of the Commission shall be liable for the contributions, penalty, interest, and costs due by the employer.

(2) When the Commission furnishes the clerk of superior court of any county in this State a written statement or certificate to the effect that any judgment docketed by the Commission against any firm or individual has been satisfied and paid in full, and said statement or certificate is signed by the chairman of the Commission and attested by its secretary, with the seal of the Commission affixed, it shall be the duty of the clerk of superior court to file said certificate and enter a notation thereof on the margin of the judgment docket to the effect that said judgment has been paid and satisfied in full, and is in consequence canceled of record. Such cancellation shall have the full force and effect of a cancellation entered by an attorney of record for the Commission. This paragraph shall apply to judgments already docketed, as well as to the future judgments docketed by the Commission. For the filing of said statement or certificate

and making new notations on the record, the clerk of superior court shall be

paid a fee of fifty cents (50c) by the Commission.

(c) Priorities under Legal Dissolution or Distributions.—In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this State, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes, and claims for remuneration of not more than two hundred and fifty dollars to each claimant, earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the Federal Bankruptcy Act of one thousand eight hundred and ninety-eight, as amended, contributions then or thereafter due shall be entitled to such priority as is provided in section sixty-four

(b) of that act (U. S. C., Title II, sec. 104 (b)), as amended.

(d) Collections of Contributions upon Transfer or Cessation of Business. — The contribution or tax imposed by § 96-9, and subsections thereunder, of this chapter shall be a lien upon the assets of the business of any employer subject to the provisions hereof who shall lease, transfer or sell out his business, or shall cease to do business and such employer shall be required, by the next reporting date as prescribed by the Commission, to file with the Commission all reports and pay all contributions due with respect to wages payable for employment up to the date of such lease, transfer, sale or cessation of the business and such employer's successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said contributions due and unpaid until such time as the former owner or employer shall produce a receipt from the Commission showing that the contributions have been paid, or a certificate that no contributions are due. If the purchaser of a business or a successor of such employer shall fail to withhold purchase money or any money due to such employer in consideration of a lease or other transfer and the contributions shall be due and unpaid after the next reporting date, as above set forth, such successor shall be personally liable to the extent of the assets of the business so acquired for the payment of the contributions accrued and unpaid on account of the opera-

tion of the business by the former owner or employer.

(e) Refunds.—If not later than three years from the last day of the period with respect to which a payment of any contributions or interest thereon was made, or one year from the date on which such payment was made, whichever shall be the later, an employer who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund, and the Commission shall determine that such contributions or any portion thereof was erroneously collected, the Commission shall allow such employer to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such an adjustment cannot be made in the next succeeding calendar quarter after such application for such refund is received, or if said money which constitutes the overpayment has been in the possession of the Commission for six months or more, a cash refund may be made, without interest, from the fund: that any interest refunded under this subsection, which has been paid into the Special Employment Security Administration Fund established pursuant to § 96-5 (c), shall be paid out of such fund. For like cause and within the same period, adjustment or refund may be so made on the Commission's own initiative. Provided further, that nothing in this section or in any other section of this chapter shall be construed as permitting the refund of moneys due and payable under the law and regulations in effect at the time such moneys were paid. In any case where the Commission finds that any employing unit has erroneously paid to this State contributions or interest upon wages earned by individuals in employment in another state, refund or adjustment thereof shall be made, without interest, irrespective of any other provisions of this subsection, upon satisfactory proof to the Commission that the payment of such contributions or interest has been made to such other state.

(f) No injunction shall be granted by any court or judge to restrain the collection of any tax or contribution or any part thereof levied under the provisions of this chapter nor to restrain the sale of any property under writ of execution, judgment, decree or order of court for the nonpayment thereof. Whenever any employer, person, firm or corporation against whom taxes or contributions provided for in this chapter have been assessed, shall claim to have a valid defense to the enforcement of the tax or contribution so assessed or charged, such employer, person, firm or corporation shall pay the tax or contribution so assessed to the Commission; but if at the time of such payment he shall notify the Commission in writing that the same is paid under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the Commission; and if the same shall not be refunded within ninety days thereafter, he may sue the Commission for the amount so demanded; such suit against the Employment Security Commission of North Carolina must be brought in the superior court of Wake County, or in the county in which the taxpayer resides, or in the county where the taxpayer conducts his principal place of business; and if, upon the trial it shall be determined that such tax or contribution or any part thereof was for any reason invalid, excessive or contrary to the provisions of this chapter, the amount paid shall be refunded by the Commission accordingly. The remedy provided by this subsection shall be deemed to be cumulative and in addition to such other remedies as are provided by other subsections of this chapter. No suit, action or proceeding for refund or to recover contributions or payroll taxes paid under protest according to the provisions of this subsection shall be maintained unless such suit, action or proceeding is commenced within one year after the expiration of the ninety days mentioned in this subsection, or within one year from the date of the refusal of said Commission to make refund should such refusal be made before the expiration of said ninety days above mentioned. The one-vear limitation here imposed shall not be retroactive in its effect, shall not apply to pending litigation nor shall the same be construed as repealing, abridging or extending any other limitation or condition imposed by this chapter.

(g) Any employer refusing to make reports required under this chapter, after ten days' written notice sent by the Commission to the employer's last known address by registered mail, may be enjoined from operating in violation of the provisions of this chapter upon the complaint of the Commission, in any court of competent jurisdiction, until such reports shall have been made. When an execution has been returned to the Commission unsatisfied, and the employer, after ten days' written notice sent by the Commission to the employer's last known address by registered mail, refuses to pay contributions covered by the execution, such employer may be enjoined from operating in violation of the provisions of this chapter upon the complaint of the Commission, in any court

of competent jurisdiction, until such contributions have been paid.

(h) When any uncertified check is tendered in payment of any contributions to the Commission and such check shall have been returned unpaid on account of insufficient funds of the drawer of said check in the bank upon which same is drawn, a penalty shall be payable to the Commission, equal to ten per cent (10%) of the amount of said check, and in no case shall such penalty be less than

one dollar (\$1.00) nor more than two hundred dollars (\$200.00).

(i) No suit or proceedings for the collection of unpaid contributions may be begun under this chapter after five years from the date on which such contributions become due, and no suit or proceeding for the purpose of establishing liability and/or status may be begun with respect to any period occurring more than five years prior to the first day of January of the year within which such suit or proceeding is instituted; provided, that this subsection shall not apply in

any case of willful attempt in any manner to defeat or evade the payment of any contributions becoming due under this chapter: Provided, further, that a proceeding shall be deemed to have been instituted or begun upon the date of issuance of an order by the chairman of the Commission directing a hearing to be held to determine liability or nonliability, and/or status under this chapter of an employing unit, or upon the date notice and demand for payment is mailed by registered mail to the last known address of the employing unit: Provided, further, that the order mentioned herein shall be deemed to have been issued on the date such order is mailed by registered mail to the last known address of the employing unit. (Ex. Sess. 1936, c. 1, s. 14; 1939, c. 27, ss. 9, 10; 1941, c. 108, ss. 14-16; 1943, c. 377, ss. 24-28; 1945, c. 221, s. 1; c. 288, s. 1; c. 522, ss. 17-20; 1947, c. 326, ss. 18-20; c. 598, s. 9; 1949, c. 424, ss. 14-16.)

Editor's Note. — The 1939 amendment added subsections (d) and (f).

The 1941 amendment inserted the words "one-half of" in subsection (a), inserted the second proviso in subsection (e) and added the last two sentences of subsection (f).

The 1943 amendment added the last sentence of subsection (a), rewrote subsection (b), and made changes in subsection (e). It reduced the limitation named in the last two sentences of subsection (f) from three years to one year, and added subsection

The first 1945 amendment inserted the provision as to venue near the middle of subsection (f). The second 1945 amendment inserted at the end of the second sentence of subsection (b) the provision as to fee for docketing and indexing certificate. The third 1945 amendment inserted the references to the United States in subsection (a), added subparagraph (2) to subsection (b), made changes in subsection (e), and added subsections (h) and (i).

The 1947 amendments changed the amount of the bond in paragraph (1) of subsection (b) from two to three thousand dollars, added the proviso at the end of the first sentence of subsection (e), substituted "Commission" for "Commissioner" in the next to the last sentence of subsection (f) and added the provisos at the end of subsection (i).

The 1949 amendment substituted in the second sentence of subsection (a) the words "Special Employment Security Administration Fund" for the words "Unemployment Compensation Fund," added the last sentence of subsection (e) and made changes in subsection (i).

This chapter provides remedies for an employer who claims a valid defense to the enforcement of the tax or to the collection of the contributions assessed. In addition to right of appeal from the decision of the Commission, it is provided that he may pay the tax under protest and sue for its recovery. The remedy provided by this section must be pursued in the manner

therein prescribed. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

The remedies provided by this chapter are adequate and preclude an employer from maintaining suit in the superior court seeking judgment that salaries paid certain of its employees should not be included in computing the amount of contributions it should pay. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

Judgment That Certain Salaries Be Not Included Cannot Be Obtained .- A judgment that salaries paid to certain of plaintiff's employees should not be included in computing the amount of the contributions plaintiff should pay under this chapter would in effect enjoin the Commission from seeking further to collect the amount of contributions which it contends are justly due, and it being expressly provided that injunction shall not lie to restrain the collection of any tax or contribution levied under the chapter, the court is without jurisdiction of an action seeking such relief, since it may not do indirectly what it is prohibited from doing directly. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

Single Employing Unit.—Where the Commission contended that an employer and another concern controlled by the same interests jointly constituted a single employment unit liable for the payment of unemployment compensation contributions and it wished to have this liability judicially adjudged, it was required to follow the procedure prescribed by this section. In re Mitchell, 220 N. C. 65, 16 S. E. (2d) 476, 142 A. L. R. 931 (1941). See note to § 96-8.

Subsection (e) relating to refunds is procedural, and limitation it imposes is addressed to the power of the Commission to make a refund and the conditions upon which it may be made rather than to any limitation upon an action for the recovery of money. It is broad enough in its phraseology to cover refund of money paid

through mistake, without raising technical distinctions between voluntary and involuntary payments. B-C Remedy Co. v. Unemployment Compensation Comm., 226 N. C. 52, 36 S. E. (2d) 733, 163 A. L. R. 773 (1946).

Retroactive Extension of Time for Applying for Refunds.—While the limitation on the authority of the Commission to make refunds is fatal to a claim, so long as the limitation lasts, a change of law, enlarging time in which refunds may be applied for or made, does not involve any

constitutional inhibitions such as apply to ordinary statutes of limitation, and the legislature has the power to apply the extended time retroactively. B-C Remedy Co. v. Unemployment Compensation Comm., 226 N. C. 52, 36 S. E. (2d) 733, 163 A. L. R. 773 (1946), so holding as to the 1943 amendment of subsection (e).

Cited, as to subsection (d), in Employment Security Comm. v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391

(1947).

§ 96-11. Period, election, and termination of employer's coverage.—
(a) Any employing unit which is or becomes an employer subject to this chapter within any calendar year shall be subject to this chapter during the whole of such calendar year except as otherwise provided in § 96-8 (f) (2); provided, however, that on and after July first, one thousand nine hundred thirty-nine, this section shall not be construed to apply to any part of the business of an employer as may come within the terms of section one (a) of the Federal Railroad Un-

employment Insurance Act.

(b) Except as otherwise provided in subsections (a), (c) and (d) of this section, an employing unit shall cease to be an employer subject to this chapter only as of the first day of January of any calendar year, if it files with the Commission prior to the first day of March of such year a written application for termination of coverage and the Commission finds that there were no twenty different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed eight or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week). For the purpose of this subsection, the two or more employing units mentioned in paragraphs two or three of § 96-8, subsection (f), of this chapter shall be treated as a single employing unit.

(c) (1) An employing unit, not otherwise subject to this chapter, which files with the Commission its written election to become an employer subject hereto for not less than two calendar years shall, with the written approval of such election by the Commission, become an employer subject hereto to the same extent as all other employers, as of the date stated in such approval, and shall cease to be subject hereto as of January one of any calendar year subsequent to such two calendar years only if, prior to the first day of March following such first day of January, it has filed with the Commission a written notice to that effect.

(2) Any employing unit for which services that do not constitute employment as defined in this chapter are performed may file with the Commission a written election that all such services performed by individuals in its employ, in one or more distinct establishments or places of business, shall be deemed to constitute employment for all the purposes of this chapter for not less than two calendar years. Upon the written approval of such election by the Commission such services shall be deemed to constitute employment subject to this chapter from and after the date stated in such approval. Such services shall cease to be deemed employment, subject hereto as of January one of any calendar year subsequent to such two calendar years only if, prior to the first day of March following such first day of January, such employing unit has filed with the Commission a written notice to that effect.

(d) An employer who has not had any individuals in employment for a period of five consecutive calendar years shall cease to be subject to this chapter. (Ex. Sess. 1936, c. 1, s. 8; 1939, c. 52, ss. 2, 3; 1941, c. 108, s. 9; 1945, c. 522, ss. 21-23; 1949, c. 424, ss. 17, 18; c. 522.)

Editor's Note.—The 1939 amendment inserted the reference to subsection (a) added the proviso to subsection (a), and near the beginning of subsection (b).

The 1941 amendment rewrote subsec-

tion (b).

The 1945 amendment substituted in subsection (b) the words "first day of March" for "thirty-first day of January." The amendment also substituted near the ends of paragraphs (1) and (2) of subsection (c) the words "prior to the first day of

March following" for the words "at least thirty days prior to."

The 1949 amendment inserted the exception clause in subsection (a), inserted the reference to subsection (d) near the beginning of subsection (b) and added subsection (d).

§ 96-12. Benefits.—(a) Payment of Benefits.—Twenty-four months after the date when contributions first accrue under this chapter benefits shall become payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the Commission may prescribe.

(b) (1) Each eligible individual whose benefit year begins on and after March 13, 1945, and prior to the effective date of this chapter, and who is totally unemployed in any week as defined by § 96-8 (k) (1), shall be paid benefits with respect to such week or weeks at the rate per week appearing in the following table in Column II opposite which in Column I appear the wages paid to such individual during his base period with respect to employment.

Column I		Column II	
Wages Paid During Base Period		Weekly Benefit Amount	
\$ 130.00 to	\$ 152.99	\$ 4.00	
153.00	178.99	4.50	
179.00	207.99	5.00	
208.00	239.99	5.50	
240.00	275.99	6.00	
276.00	316.99	6.50	
317.00	362.99	7.00	
363.00	415.99	7.50	
416.00	464.99	8.00	
465.00	519.99	8.50	
520.00	580.99	9.00	
581.00	649.99	9.50	
650.00	727.99	10.00	
728.00	788.99	10.50	
789.00	853.99	11.00	
854.00	923.99	11.50	
924.00	999.99	12.00	
1,000.00	1,081.99	12.50	
1,082.00	1,169.99	13.00	
1,170.00	1,265.99	13.50	
1,266.00	1,370.99	14.00	
1,371.00	1,485.99	14.50	
1,486.00	1,611.99	15.00	
1,612.00	1,663.99	15.50	
1,664.00	1,715.99	16.00	
1,716.00	1,767.99	16.50	
1,768.00	1,819.99	17.00	
1,820.00	1,871.99	17.50	
1,872.00	1,923.99	18.00	
1,924.00	1,975.99	18.50	
1,976.00	2,027.99	19.00	
2,028.00	2,079.99	19.50	
2,080.00	and over	20.00	

(2) Each eligible individual whose benefit year begins on and after the effective date of this chapter, and who is totally unemployed in any week as defined by § 96-8 (k) (1), shall be paid benefits with respect to such week or weeks at the rate per week appearing in the following table in Column II opposite which in Column I appear the wages paid to such individual during his base period with respect to employment.

Column I		Column II
Wages Paid During		Weekly Benefit
Base Period		Amount
Less than \$200.00		Ineligible
\$ 200.00 to	\$ 232.99	\$ 6.00
233.00	261.99	6.50
262.00	293.99	7.00 7.50
	294.00 327.99	
328.00	363.99	8.00
364.00	401.99	8.50
402.00	442.99	9.00
443.00	485.99	9.50
486.00	531.99	10.00
532.00 580.00	579.99	10.50
632.00	631.99	11.00
685.00	684.99 7 42.99	11.50
743.00	802.99	12.00
803.00	865.99	12.50 13.00
866.00	932,99	13.50
933.00	1,003.99	14.00
1,004.00	1,077.99	14.50
1,078.00	1,155.99	15.00
1,156.00	1,237.99	15.50
1,238.00	1,324.99	16.00
1,325.00	1,415.99	16.50
1,416.00	1,490.99	17.00
1,491.00	1,579.99	17.50
1,580.00	1,636.99	18.00
1,637.00	1,696.99	18.50
1,697.00	1,772.99	19.00
1,773.00	1,851.99	19.50
1,852.00	1,915.99	20.00
1,916.00	1,980.99	20.50
1,981.00	2,047.99	21.00
2,048.00	2,115.99	21.50
2,116.00 2,185.00	2,184.99	22.00
2,185.00 2,255.00	2,2 54.99 2,3 15.99	22.50
2,255.00	2,315.99 2,375.99	23.00 23.50
2,376.00 2,376.00	2,375.99 2,437.99	23.50
2,438.00	2, 499.99	24.50
2,500.00	and over	25.00
2,000.00	and over	2.00

⁽c) Weekly Benefit for Partial Unemployment.—Each eligible individual who is partially unemployed (as defined in § 96-8 (k) (2)) in any week shall be paid with respect to such week a partial benefit. Such partial benefit shall be an amount figured to the nearest multiple of fifty cents (50c) which is equal to the difference

between the weekly benefit amount as defined in § 96-8 (q) plus two dollars (\$2.00)

and the wages payable to him, if any, with respect to such week.

(d) Duration of Benefits.—The maximum amount of benefits payable to any eligible individual whose benefit year begins prior to March 21, 1949, shall be sixteen times his weekly benefit amount during such benefit year. The maximum amount of benefits payable to any eligible individual whose benefit year begins after the effective date of this chapter shall be twenty times his weekly benefit amount during any benefit year. The Commission shall maintain accounts for each individual who earns wages in such manner and form as the Commission may prescribe as being adequate to administer the provisions of this chapter. (Ex. Sess. 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21.)

Editor's Note.—The 1937 amendment inserted at the end of the second sentence of subsection (d) the words "except where the Commission may find other forms of reports adequate," which were subsequently omitted.

The 1939 amendments inserted the words "figured to the nearest multiple of fifty cents" in the second sentence of subsection (c) and made other changes.

The first 1941 amendment added the part of subsection (b) which subsequently

became subdivision (2). The second 1941 amendment added a former subsection relating to the benefit rights of trainees in military service, which was repealed by the 1947 amendment.

The 1943 amendment rewrote subsection (d) and made other changes.

The 1945 amendment made changes in subsections (b) and (c).

The 1949 amendment rewrote subsection (b), the second sentence of subsection (c), and subsection (d).

§ 96-13. Benefit eligibility conditions. — An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that—

(a) He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the Commission may prescribe;

(b) He has made a claim for benefits in accordance with the provisions of §

96-15 (a);

(c) He is able to work, and is available for work: Provided that no individual shall be deemed available for work unless he establishes to the satisfaction of the Commission that he is actively seeking work: Provided further, that an individual customarily employed in seasonal employment, shall during the period of nonseasonal operations, show to the satisfaction of the Commission that such individual is actively seeking employment which such individual is qualified to perform by past experience or training during such nonseasonal period: Provided further, that no individual shall be considered able and available for work for any week during the three-month period immediately before the expected birth of a child to such individual, and for any week during the three-month period immediately following the birth of a child to such individual; however, no individual shall be denied benefits by reason of this proviso in the event of the death of such child, if such individual is otherwise eligible: Provided further, however, that effective January 1, 1949, no individual shall be considered available for work for any week not to exceed two in any calendar year in which the Commission finds that his unemployment is due to a vacation. In administering this proviso, benefits shall be paid or denied on a payroll week basis as established by the employing unit. A week of unemployment due to a vacation as provided herein means any payroll week within which as much as sixty per cent of the full time working hours consists of a vacation period. For the purpose of this subsection, any unemployment which is caused by a vacation period and which occurs in the calendar year following that within which the vacation period begins shall be deemed to have occurred in the calendar year within which such vacation period begins.

(d) He has been totally unemployed for a waiting period of one week (and for the purpose of this subsection, two weeks of partial unemployment shall be deemed to be equivalent to one week of total unemployment. Such weeks of partial unemployment need not be consecutive). No week shall be counted as a week of total unemployment for the purpose of this subsection:

(1) If benefits have been paid with respect thereto:

(2) Unless the individual was eligible for benefits with respect thereto in all respects except for the requirements of this subsection and subsection (g) of § 96-14;

(3) Unless it occurred within the benefit year which includes the week with

respect to which he claims benefits.

Provided, that no individual shall be required to accumulate more than one such waiting period week in any benefit year. (Ex. Sess. 1936, c. 1, s. 4; 1939, c. 27, ss. 4, 5; c. 141; 1941, c. 108, s. 2; 1943, c. 377, s. 5; 1945, c. 522, ss. 27-28; 1947, c. 326, s. 22; 1949, c. 424, s. 22.)

Editor's Note.—The 1939 amendment added a proviso to former subsection (e).

Prior to the 1941 amendment the waiting period prescribed by subsection (d) was two weeks.

The 1943 amendment rewrote subsection (c), and called for changes in subsection (d) which had already been made by the 1941 amendment and by the Division of Legislative Drafting and Codification of Statutes.

The 1945 amendment made changes in subsection (c) and rewrote subsection (d).
The 1947 and 1949 amendments also

made changes in subsection (c).

Evidence Showing Failure Actively to Seek Work.—Evidence that during a period of six months claimant's efforts to obtain employment, in addition to reporting to the employment service office, were limited to two occasions at one mill and one occasion at each of three other mills, is sufficient to sustain the Commission's finding that he had failed to show that he had been actively seeking work within the purview of subsection (c) of this section. State v. Roberts, 230 N. C. 262, 52 S. E. (2d) 890 (1949).

§ 96-14. Disqualification for benefits.—An individual shall be disqualified for benefits:

- (a) For not less than four, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work voluntarily without good cause attributable to the employer, and the maximum benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.
- (b) For not less than five, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work, and the maximum amount of benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.
- (c) For not less than four, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the Commission that such individual has failed without good cause (i) to apply for available suitable work when so directed by the employment

office of the Commission; or (ii) to accept suitable work when offered him; or (iii) to return to his customary self-employment (if any) when so directed by the Commission and the maximum amount of benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.

Provided, however, that in any case where any week or weeks of disqualification as provided in subsections (a), (b), and (c) of this section have not elapsed on account of the termination of an individual's benefit year, such remaining week or weeks of disqualification shall be applicable in the next benefit year at the then current benefit amount of such individual; provided such new benefit year is established by the individual within twelve months from the date of the ending of the preceding benefit year. When any individual who has been disqualified as provided in subsections (a), (b) and (c) of this section returns to employment before the disqualifying period has elapsed, the remaining week or weeks of disqualification shall be canceled and no deduction based on such weeks shall be made from the maximum amount of benefits of such individual; provided such individual shows the fact of employment to the satisfaction of the Commission.

(1) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary

occupation, and the distance of the available work from his residence.

(2) Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (b) if the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(d) For any week with respect to which the Commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to

the satisfaction of the Commission that-

(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

- (2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute: Provided, for the purpose of this subsection (d), that if in any case separate branches of work which are commonly conducted as separate business in separate premises are conducted in separate departments of the same premises, each such department shall be deemed to be a separate factory, establishment, or other premises.
- (e) For any week with respect to which he is receiving or has received remuneration in the form of remuneration in lieu of notice: Provided, that if such remuneration is less than the benefits which would otherwise be due under this chapter he shall be entitled to receive for such week, if otherwise eligible, benefits reduced by the amount of such remuneration.
- (f) If the Commission finds he is customarily self-employed and can reasonably return to self-employment.
 - (g) For any week after June thirtieth, one thousand nine hundred thirty-

nine with respect to which he shall have and assert any right to unemployment benefits under an employment security law of either the federal or a state government, other than the State of North Carolina, (Ex. Sess. 1936, c. 1, s. 5; 1937, c. 448, ss. 2, 3; 1939, c. 52, s. 1; 1941, c. 108, ss. 3, 4; 1943, c. 377, ss. 7, 8; 1945, c. 522, s. 29; 1947, c. 598, s. 10; c. 881, ss. 1, 2; 1949, c. 424, ss. 23-25.)

Editor's Note.—The 1941 amendment struck out former subsections (a), (b), (c), (d) and (e) and inserted new subsections in lieu thereof. The amendment also struck out the former second and third paragraphs of subsection (f).

The 1943 amendment rewrote subsections (a) and (b), and all of subsection (c) except paragraphs (1) and (2). It omitted from subsection (e) a provision relating to remuneration in the form of primary insurance payments with respect to old age benefits under the Social Security Act.

The 1945 amendment added the latter part of the first paragraph of subsection (c) beginning with the words "and the

maximum amount of benefits."

The 1947 amendment added provisions to subsections (a) and (b) which were struck out by the 1949 amendment, and substituted "have and assert" for "have or assert" in subsection (g). The 1949 amendment also rewrote the second paragraph of subsection (c).

This section prevails over the provision of § 96-2 stating the general policy of the statute to provide for benefits to workers who are "unemployed through no fault of their own." In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929

(1941).

Employees who participate in, finance or who are directly interested in a labor dispute which results in stoppage of work, or who are members of a grade or class of workers which has members employed at the premises at which the stoppage occurs, any of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute, are not entitled to unemployment compensation benefits during the stoppage of work, and each employee-claimant is required to show to the satisfaction of the Commission that he is not disqualified under the terms of this section. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941).

The evidence tended to show that employee-claimants not only did not work during the period of stoppage of work at the employer's plant caused by a labor dispute, but also that they did not resume work after operations at the plant were resumed, and after notification by the employer that jobs were available. There was also evidence on behalf of claimants that they did not return to their jobs because of the labor dispute. The Commission ruled that claimants were not entitled to benefits during the stoppage of work. It was held that the employer is not prejudiced by the further order of the Commission that the eligibility of claimants to benefits subsequent to the resumption of operations at the plant should be determined, since it must be presumed the Commission will determine eligibility of each claimant for such benefits in accordance with objective standards or criteria set up in the chapter, but the existence and effect of a labor dispute may have an essential bearing upon the eligibility of claimants, the suitableness of work offered, and the disqualifications for benefits. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941).

Provisions of this chapter seeking to maintain neutrality on the part of the State in labor disputes will be given effect by the courts, since the matter of policy is in the exclusive province of the legislature and the courts will not interfere therewith unless the provisions relating thereto have no reasonable relation to the end sought to be accomplished. In re Steelman, 219 N. C. 306, 13 S. E. (2d)

544, 135 A. L. R. 929 (1941). Where Labor Dispute Involves General

Wage Increase.—Subsection (d) of this section disqualifies for unemployment compensation benefits employees belonging to a grade or class of workers some of whom participated in and were directly interested in the strike which brought about a stoppage of work, notwithstanding the fact that the employee-claimants were not members of the union and did not participate in, or help finance, the strike, especially where the strike involved, in addition to a maintenance of membership clause in the contract of employment, a general increase in wages, from which the employee-claimants stood to benefit. Unemployment Compensation Comm. Lunceford, 229 N. C. 570, 50 S. E. (2d) 497 (1948).

Employees Disqualified under Subsection (d) (2).—Employee-claimants

are not directly interested in the labor dispute which brings about the stoppage of work, and who do not participate in, help finance or benefit from the dispute, are nevertheless disqualified from unemployment compensation benefits if they belong to a grade or class of workers employed at the premises immediately before the commencement of the stoppage, some of whom, immediately before the stoppage

occurs, participate in, finance or are directly interested in such labor dispute. State v. Martin, 228 N. C. 227, 45 S. E. (2d) 385 (1947).

Burden of Proof.—Each claimant is required to show to the satisfaction of the Commission that he is not disqualified for benefits under this section. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941).

§ 96-15. Claims for benefits.—(a) Filing.—Claims for benefits shall be made in accordance with such regulations as the Commission may prescribe. Each employing unit shall post and maintain in places readily accessible to individuals performing services for it printed statements, concerning benefit rights, claims for benefits, and such other matters relating to the administration of this chapter as the Commission may direct. Each employing unit shall supply to such individuals copies of such printed statements or other materials relating to claims for benefits as the Commission may direct. Such printed statements and other materials shall be supplied by the Commission to each employing unit without cost to the employing unit.

(b) Initial Determination.—A representative designated by the Commission and hereinafter referred to as a deputy shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof, or shall refer such claim or any question involved therein to an appeal tribunal or to the Commission, which shall make its determination with respect thereto in accordance with the procedure described in subsection (c) of this section. The deputy shall promptly notify the claimant and any other interested party of his decision and the reason therefor. Unless the claimant or any such interested party, within five calendar days after such notification was mailed to his last known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith, and for the purpose of this subsection, the Commission shall be deemed an interested party: Provided, however, that any individual who files his claim outside of this State shall have eight calendar days from the date of mailing such notification to his last known address in which to perfect his appeal. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the Commission shall be paid only after such determination: Provided further, however, that if an appeal tribunal affirms a decision of a deputy, or the Commission affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's reserve account shall be charged with benefits so paid and such payments shall be charged to the pooled account.

(c) Appeals.—Unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the deputy. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision of the Commission, unless within ten days after the date of notification or mailing of such decision further appeal is

initiated pursuant to subsection (e) of this section.

(d) Appeal Tribunals.—To hear and decide disputed claims, the Commission shall establish one or more impartial appeal tribunals consisting in each case of either a salaried examiner or a body consisting of three members, one of whom shall be a salaried examiner, who shall serve as chairman, one of whom shall be a representative of employers and the other of whom shall be a representative of employees; each of the latter two members shall serve at the pleasure of the

Commission and be paid a fee of not more than five dollars per day of active service on such tribunal plus necessary expenses. No person shall participate on behalf of the Commission in any case in which he is an interested party. The Commission may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal. The chairman shall act alone in the absence or disqualification of any other member and his alternates. In no case shall the hearings proceed unless the chairman of the appeal tribunal is present.

(e) Commission Review.—The Commission may on its own motion affirm, modify, or set aside any decision of an appeals tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it, or may provide for group hearings in such cases as the Commission may deem expedient. Provided, however, that upon denial by the Commission of an application for appeal from the decision of an appeals tribunal, the decision of the appeals tribunal shall be deemed to be the decision of the Commission within the meaning of this subsection for purposes of judicial review and shall be subject to judicial review within the time and in the manner provided for with respect to a decision of the Commission, except that the time for initiating such review shall run from the date of mailing or delivery of the notice of the order of the Commission denying the application for appeal. The Commission shall permit such further appeal by any of the parties interested in the decision of an appeals tribunal which is not unanimous. The Commission may remove to itself or transfer to another appeals tribunal, the proceedings on any claim pending before an appeals tribunal. Any proceedings so removed to the Commission shall be heard by a quorum thereof in accordance with the requirements in subsection (c) of this section. The Commission shall promptly notify the interested parties of its findings and decision.

(f) Procedure.—The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with rules prescribed by the Commission for determining the rights of the parties, whether or not such rules conform to common-law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing before an appeals tribunal upon a disputed claim shall be recorded unless the recording is waived by all interested parties, but need not be transcribed unless the dis-

puted claim is further appealed.

(g) Witness Fees.—Witnesses subpoenaed pursuant to this section shall be allowed fees at a rate fixed by the Commission. Such fees and all expenses of proceedings involving disputed claims shall be deemed a part of the expense

of administering this chapter.

(h) Appeal to Courts.—Any decision of the Commission, in the absence of an appeal therefrom as herein provided, shall become final ten days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his remedies before the Commission as provided by this chapter. The Commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney who

has been designated by it for that purpose.

(i) Appeal Proceedings.—The decision of the Commission shall be final, subject to appeal as herein provided. Within ten days after the decision of the Commission has become final, any party aggrieved thereby may appeal to the superior court of the county of his residence. In case of such appeal, the court shall have power to make party-defendant any other party which it may deem necessary or proper to a just and fair determination of the case. In every case in which appeal is demanded, the appealing party shall file a statement with the Commission within the time allowed for appeal, in which shall be plainly

stated the grounds upon which a review is sought and the particulars in which it is claimed the Commission is in error with respect to its decision. The Commission shall make a return to the notice of appeal, which shall consist of all documents and papers necessary to an understanding of the appeal, and a transcript of all testimony taken in the matter, together with its findings of fact and decision thereon, which shall be certified and filed with the superior court to which appeal is taken within thirty days of said notice of appeal. The Commission may also, in its discretion, certify to such court questions of law involved in any decision by it. In any judicial proceeding under this section the findings of the Commission as to the facts, if there is evidence to support it, and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner, and shall be given precedence over all civil cases, except cases arising under the Workmen's Compensation Law of this State. An appeal may be taken from the decision of the superior court, as provided in civil cases. No bond shall be required upon such appeal. Upon the final determination of the case or proceeding the Commission shall enter an order in accordance with such determination. Such an appeal shall not act as a supersedeas or stay of any judgment, order, or decision of the court below, or of the Commission unless the Commission or the court shall so order as to the decision rendered by it. (Ex. Sess. 1936, c. 1, s. 6; 1937, c. 150; c. 448, s. 4; 1941, c. 108, s. 5; 1943, c. 377, ss. 9, 10; 1945, c. 522, ss. 30-32; 1947, c. 326, s. 23.)

Editor's Note. — The first 1937 amendment omitted the requirement that attorneys representing the Commission as mentioned in subsection (h) be regular employees of the Commission. The second 1937 amendment inserted the clause beginning "or may provide" at the end of the first sentence of subsection (e).

The 1941 amendment rewrote subsec-

The 1943 amendment added to the third sentence of subsection (b) the provision that the Commission shall be deemed an interested party. It also inserted the first proviso to said sentence. The amendment omitted the words "and by the deputy whose decision has been overruled or modified by an appeal tribunal" formerly appearing at the end of the second sentence of subsection (e).

The 1945 amendment rewrote subsection (a), inserted in subsection (e) the proviso following the first sentence, and inserted in the last sentence of subsection (f) the words "before an appeal tribunal." The 1947 amendment inserted in the last sentence of subsection (f) the words "unless the recording is waived by all interested parties."

Appeal to Superior Court.—Under subsection (a) of § 96-4 the chairman of the Employment Security Commission is vested with all authority of the Commission, and where it appears that a claim was heard on appeal by the chairman, and that claimant appealed therefrom "to the full Commission or to the superior court," the hearing of the appeal by the superior court was in

accordance with the statute. State v. Roberts, 230 N. C. 262, 52 S. E. (2d) 890 (1949).

Appeal by Commission.—Under this section the exact status of the Commission as a party to an action is not defined and the part it is to play as such is left somewhat in the realm of speculation, and there is nothing in the provision which constitutes the Commission guardian or trustee for a claimant or which would warrant the conclusion that it is authorized to prosecute an appeal from a judgment against a claimant when the claimant is content. Normay it do so for the purpose of adjudicating issues which are merely incidental to the claimant's cause of action. In re Mitchell, 220 N. C. 65, 16 S. E. (2d) 476, 142 A. L. R. 931 (1941).

Conclusiveness of Findings of Fact on Appeal.—Upon appeal to the superior court from any final decision of the Commission, the findings of the Commission as to the facts, if supported by evidence, and in the absence of fraud, are conclusive, the jurisdiction of the superior court on appeal being limited to questions of law. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941).

The finding of the Commission that employee-claimants belong to the same grade or class of workers as other employees, some of whom, immediately before the stoppage occurred, participated in and were directly interested in the labor dispute causing the stoppage, was supported by ample evidence and was therefore conclusive, there being no allegation or evi-

dence of fraud. State v. Martin, 228 N. C. 277, 45 S. E. (2d) 385 (1947). C. 576, 14 S. E. (2d) 689, 139 A. L. R. 895 Cited in Unemployment Compensation (1941).

§ 96-16. Seasonal pursuits.—(a) A seasonal pursuit is one which, because of seasonal conditions making it impracticable or impossible to do otherwise, customarily carries on production operations only within a regularly recurring active period or periods of less than an aggregate of thirty-six weeks in a calendar year. No pursuit shall be deemed seasonal unless and until so found by the Commission.

(b) Upon application therefor by a pursuit, the Commission shall determine or redetermine whether such pursuit is seasonal and, if seasonal, the active period or periods thereof. The Commission may, on its own motion, redetermine the active period or periods of a seasonal pursuit. An application for a seasonal determination must be made on forms prescribed by the Commission and must be made at least twenty days prior to the beginning date of the period of production

operations for which a determination is requested.

(c) Whenever the Commission has determined or redetermined a pursuit to be seasonal, such pursuit shall be notified immediately, and such notice shall contain the beginning and ending dates of the pursuit's active period or periods. Such pursuits shall display notices of its seasonal determination conspicuously on its premises in a sufficient number of places to be available for injection by its workers. Such notices shall be furnished by the Commission.

(d) A seasonal determination shall become effective unless an interested party files an application for review within ten days after the beginning date of the first period of production operations to which it applies. Such an application for review shall be deemed to be an application for a determination of status, as provided in § 96-4, subsections (m) through (q), of this chapter, and shall be heard and determined in accordance with the provisions thereof.

(e) All wages paid to a seasonal worker during his base period shall be used

in determining his weekly benefit amount.

- (f) (1) A seasonal worker shall be eligible to receive benefits based on seasonal wages only for a week of unemployment which occurs, or the greater part of which occurs within the active period or periods of the seasonal pursuit or pursuits in which he earned base period wages.
- (2) A seasonal worker shall be eligible to receive benefits based on nonseasonal wages only for a week of unemployment which occurs, or the greater part of which occurs within the inactive period or periods of the seasonal pursuit or pursuits in which he earned base period wages.
- (3) The maximum amount of benefits which a seasonal worker shall be eligible to receive based on seasonal wages shall be an amount, adjusted to the nearest multiple of fifty cents (50c), determined by multiplying the maximum benefits payable in his benefit year, as provided in § 96-12 (d) of this chapter, by the percentage obtained by dividing the seasonal wages in his base period by all of his base period wages.
- (4) The maximum amount of benefits which a seasonal worker shall be eligible to receive based on nonseasonal wages shall be an amount, adjusted to the nearest multiple of fifty cents (50c), determined by multiplying the maximum benefits payable in his benefit year, as provided in § 96-12 (d) of this chapter, by the percentage obtained by dividing the nonseasonal wages in his base period by all of his base period wages.

(5) In no case shall a seasonal worker be eligible to receive a total amount of benefits in a benefit year in excess of the maximum benefits payable for such

benefit year, as provided in § 96-12 (d) of this chapter.

(g) (1) All benefits paid to a seasonal worker based on seasonal wages shall be charged, as prescribed in § 96-9 (c) (2) of this chapter, against the reserve account of his base period employer or employers who paid him such seasonal

wages, and for the purpose of this paragraph such seasonal wages shall be deemed

to constitute all of his base period wages.

(2) All benefits paid to a seasonal worker based on nonseasonal wages shall be charged, as prescribed in § 96-9 (c) (2) of this chapter, against the reserve account of his base period employer or employers who paid him such nonseasonal wages, and for the purpose of this paragraph such nonseasonal wages shall be deemed to constitute all of his base period wages.

(h) The benefits payable to any otherwise eligible individual shall be calculated in accordance with this section for any benefit year which is established on or after the beginning date of a seasonal determination applying to a pursuit by which such individual was employed during the base period applicable to such benefit year, as if such determination had been effective in such base period.

(i) Nothing in this section shall be construed to limit the right of any individual whose claim for benefits is determined in accordance herewith to appeal

from such determination as provided in § 96-15 of this chapter.

(j) As used in this section:

(1) "Pursuit" means an employer or branch of an employer.

(2) "Branch of an employer" means a part of an employer's activities which is carried on or is capable of being carried on as a separate enterprise.

(3) "Production operations" mean all the activities of a pursuit which are

primarily related to the production of its characteristic goods or services.

(4) "Active period or periods" of a seasonal pursuit means the longest regularly recurring period or periods within which production operations of the pursuit are customarily carried on.

pursuit are customarily carried on.

(5) "Seasonal wages" mean the wages earned in a seasonal pursuit within its active period or periods. The Commission may prescribe by regulation the manner in which seasonal wages shall be reported.

(6) "Seasonal worker" means a worker at least twenty-five per cent of whose

base period wages are seasonal wages.

(7) "Interested party" means any individual affected by a seasonal determination.

(8) "Inactive period or periods" of a seasonal pursuit means that part of a calendar year which is not included in the active period or periods of such pursuit.

(9) "Nonseasonal wages" mean the wages earned in a seasonal pursuit within the inactive period or periods of such pursuit, or wages earned at any time in a nonseasonal pursuit.

(10) "Wages" mean remuneration for employment. (1939, c. 28; 1941, c.

108, s. 7; 1943, c. 377, s. 14½; 1945, c. 522, s. 33.)

Editor's Note.—The 1945 amendment rewrote this section as changed by the 1941 and 1943 amendments.

§ 96-17. Protection of rights and benefits.— (a) Waiver of Rights Void.—Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this chapter shall be void. Any agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contributions, required under this chapter from such employer, shall be void. No employer shall directly or indirectly make or require or accept any deduction from the remuneration of individuals in his employ to finance the employer's contributions required from him, or require or accept any waiver of any right hereunder by any individual in his employ. Any employer or officer or agent of an employer who violates any provision of this subsection shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars or be imprisoned for not more than six months, or both.

(b) Limitation of Fees.—No individual claiming benefits shall be charged fees of any kind in any proceeding under this chapter by the Commission or its representatives or by any court or any officer thereof. Any individual claiming benefits

in any proceeding before the Commission or a court may be represented by counsel; but no such counsel shall either charge or receive for such services more than an amount approved by the Commission. Any person who violates any provision of this subsection shall, for each such offense, be fined not less than fifty dollars nor more than five hundred dollars or imprisoned for not more than six months, or both.

(c) No Assignment of Benefits; Exemptions.—Any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this chapter shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessaries furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this subsection shall be void. (Ex. Sess. 1936, c. 1, s. 15; 1937, c. 150.)

Editor's Note.—Prior to the 1937 amendment the individual mentioned in subsecauthorized agent as well as by counsel.

§ 96-18. Penalties.—(a) Whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this chapter, either for himself or for any other person, shall be punished by a fine of not less than twenty dollars (\$20.00) nor more than fifty dollars (\$50.00), or by imprisonment for not longer than thirty days; and each such false statement or representation or

failure to disclose a material fact shall constitute a separate offense.

(b) Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject hereto or to avoid or reduce any contributions or other payment required from an employing unit under this chapter, or who willfully fails or refuses to furnish any reports required hereunder, or to produce or permit the inspection or copying of records as required hereunder, shall be punished by a fine of not less than twenty dollars (\$20.00) or more than fifty dollars (\$50.00) or by imprisonment for not longer than thirty days; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal shall constitute a separate offense.

(c) Any person who shall willfully violate any provisions of this chapter or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not less than twenty dollars (\$20.00) or more than fifty dollars (\$50.00) or by imprisonment for not longer than thirty days, and each day such violation continues shall be deemed to be a separate offense.

(d) Any person who, by reason of the nondisclosure or misrepresentation by him or by another of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent), has received any sum as benefits under this chapter while any conditions for the receipt of benefits imposed by this chapter were not fulfilled in his case, or while he was disqualified from receiving benefits, shall, in the discretion of the Commission, either be liable to have such sum deducted from any future benefits payable to him under this chapter, or shall be liable to repay to the Commission for the Unemployment Compensation Fund a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided in § 96-10 (b) for the collection of past-due contributions.

(e) An individual shall not be entitled to receive benefits for the remainder

of any benefit year during which he has been found to have received any sum as benefits under this chapter by reason of the intentional nondisclosure or misrepresentation by him, or by another with his knowledge, of a material fact.

(f) Any individual discharged for larceny or embezzlement in connection with his employment, if such individual is convicted thereof in a court of competent jurisdiction, or if the Commission finds that he has made a voluntary confession of guilt, shall not be entitled to receive any benefits based on wages earned by such individual prior to and including the quarter within which such discharge occurred; provided the provisions of this subsection shall not be effective as to any benefits accrued or paid under a claim filed by such individual prior to the date of such discharge. (Ex. Sess. 1936, c. 1, s. 16; 1943, c. 319; c. 377, ss. 29, 30; 1945, c. 552, s. 34; 1949, c. 424, s. 26.)

Editor's Note.—The first 1943 amendment struck out the words "to make any contributions or other payments or" formerly appearing after the word "refuses" near the middle of subsection (b). The second 1943 amendment added subsections (e) and (f), and omitted the words

"or by both such fine and imprisonment" formerly appearing after the word "days" in subsection (a).

The 1945 amendment made changes in subsections (b) and (c), and the 1949 amendment made changes in subsection (f).

§ 96-19. Enforcement of Employment Security Law discontinued upon repeal or invalidation of federal acts.—It is the purpose of this chapter to secure for employers and employees the benefits of Title III and Title IX of the Federal Social Security Act, approved August fourteenth, one thousand nine hundred thirty-five, as to credit on payment of federal taxes, of State contributions, the receipt of federal grants for administrative purposes, and all other provisions of the said Federal Social Security Act; and it is intended as a policy of the State that this chapter and its requirements for contributions by employers shall continue in force only so long as such employers are required to pay the federal taxes imposed in said Federal Social Security Act by a valid act of Congress. Therefore, if Title III and Title IX of the said Federal Social Security Act shall be declared invalid by the United States Supreme Court, or if such law be repealed by congressional action so that the federal tax cannot be further levied, from and after the declaration of such invalidity by the United States Supreme Court, or the repeal of said law by congressional action, as the case may be, no further levy or collection of contributions shall be made hereunder. The enactment by the Congress of the United States of the Railroad Retirement Act and the Railroad Unemployment Insurance Act shall in no way affect the administration of this law except as herein expressly provided.

All federal grants and all contributions theretofore collected, and all funds in the treasury by virtue of this chapter, shall, nevertheless, be disbursed and expended, as far as may be possible, under the terms of this chapter: Provided, however, that contributions already due from any employer shall be collected and paid into the said fund, subject to such distribution; and provided further, that the personnel of the State Employment Security Commission shall be reduced

as rapidly as possible.

The funds remaining available for use by the North Carolina Employment Security Commission shall be expended, as necessary, in making payment of all such awards as have been made and are fully approved at the date aforesaid, and the payment of the necessary costs for the further administration of this chapter, and the final settlement of all affairs connected with same. After complete payment of all administrative costs and full payment of all awards made as aforesaid, any and all moneys remaining to the credit of any employer shall be refunded to such employer, or his duly authorized assignee: Provided, that the State employment service, created by chapter one hundred six, Public Laws of one thousand nine hundred thirty-five, and transferred by chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session, and made a part of the

Employment Security Commission of North Carolina, shall in such event return to and have the same status as it had prior to enactment of chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session, and under authority of chapter one hundred six, Public Laws of one thousand nine hundred thirty-five, shall carry on the duties therein prescribed; but, pending a final settlement of the affairs of the Employment Security Commission of North Carolina, the said State employment service shall render such service in connection therewith as shall be demanded or required under the provisions of this chapter or the provisions of chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session. (1937, c. 363; 1939, c. 52, s. 8; 1947, c. 598, s. 1.)

Editor's Note.—The 1939 amendment added the last sentence to the first paragraph.

The 1947 amendment substituted "Employment Security Commission" for "Unemployment Compensation Commission."

ARTICLE 3.

Employment Service Division.

§ 96-20. Duties of Division; conformance to Wagner-Peyser Act; organization; director; employees.—The Employment Service Division of the Employment Security Commission shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this chapter, and for the purpose of performing such duties as are within the purview of the act of Congress entitled "An act to provide for the establishment of a national employment system and for co-operation with the states in the promotion of such system and for other purposes," approved June 6th, 1933, (48 Stat., 113; U. S. C., Title 29, § 49 (c), as amended). The said Division shall be administered by a full time salaried director. The Employment Security Commission shall be charged with the duty to co-operate with any official or agency of the United States having powers or duties under the provisions of the said act of Congress, as amended, and to do and perform all things necessary to secure to this State the benefits of the said act of Congress, as amended, in the promotion and maintenance of a system of public employment offices. The provisions of the said act of Congress, as amended, are hereby accepted by this State, in conformity with § 4 of said act, and this State will observe and comply with the requirements thereof. The Employment Security Commission is hereby designated and constituted the agency of this State for the purpose of said act. The Commission is directed to appoint the director, other officers, and employees of the Employment Service Division. (Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11; 1947, c. 326, s. 24.)

Editor's Note.—The 1947 amendment rewrote this section.

- § 96-21. Co-operation with Federal Board for Vocational Education.—The Employment Service Division shall co-operate with the Federal Board for Vocational Education, division for rehabilitation of crippled soldiers and sailors, in endeavoring to secure suitable employment and fair treatment of the veterans of the World War. (1921, c. 131, s. 3; C. S., s. 7312(c); Ex. Sess. 1936, c. 1, s. 12.)
- § 96-22. Employment of minors; farm employment; promotion of Americanism.—The Employment Service Division shall have jurisdiction over all matters contemplated in this article pertaining to securing employment for all minors who avail themselves of the free employment service. The Employment Service Division shall have power to so conduct its affairs that at all times it shall be in harmony with laws relating to child labor and compulsory education; to aid in inducing minors over sixteen, who cannot or do not for various reasons attend day school, to undertake promising skilled employment; to aid in

influencing minors who do not come within the purview of compulsory education laws, and who do not attend day school, to avail themselves of continuation or special courses in existing night schools, vocational schools, part-time schools, trade schools, business schools, library schools, university extension courses, etc., so as to become more skilled in such occupation or vocation to which they are respectively inclined or particularly adapted; to aid in securing vocational employment on farms for town and city boys who are interested in agricultural work, and particularly town and city high school boys who include agriculture as an elective study; to co-operate with various social agencies, schools, etc., in group organization of employed minors, particularly those of foreign parentage, in order to promote the development of real, practical Americanism through a broader knowledge of the duties of citizenship; to investigate methods of vocational rehabilitation of boys and girls who are maimed or crippled and ways and means for minimizing such handicap. (1921, c. 131, s. 4; C. S., s. 7312(d); Ex. Sess. 1936, c. 1, s. 12.)

Editor's Note.—See 1 N. C. Law Rev.

§ 96-23. Job placement; information; research and reports. — The Employment Service Division shall make public, through the newspapers and other media, information as to situations it may have applicants to fill, and establish relations with employers for the purpose of supplying demands for labor. The Division shall collect, collate, and publish statistical and other information relating to the work under its jurisdiction; investigate economic developments, and the extent and causes of unemployment and remedies therefor within and without the State, with the view of preparing for the information of the General Assembly such facts as in its opinion may make further legislation desirable. All information obtained by the North Carolina State Employment Service Division from workers, employers, applicants, or other persons, or groups of persons in the course of administering the State public employment service program shall be absolute privileged communications and shall not be disclosed directly or indirectly except as by regulations prescribed by the Commission. (1921, c. 131, s. 5; C. S., s. 7312(e); Ex. Sess. 1936, c. 1, s. 12; 1947, c. 326, s. 25.)

Editor's Note. — The 1947 amendment added the last sentence of this section.

§ 96-24. Local offices; co-operation with United States service; financial aid from United States.—The Employment Service Division is authorized to enter into agreement with the governing authorities of any municipality, county, township, or school corporation in the State for such period of time as may be deemed desirable for the purpose of establishing and maintaining local free employment offices, and for the extension of vocational guidance in co-operation with the United States Employment Service, and under and by virtue of any such agreement as aforesaid to pay, from any funds appropriated by the State for the purposes of this article, any part or the whole of the salaries, expenses or rent, maintenance, and equipment of offices and other expenses. (1921, c. 131, s. 6; C. S., s. 7312(f); 1931, c. 312, s. 3; 1935, c. 106, s. 4; Ex. Sess. 1936, c. 1, s. 12.)

Editor's Note.—Prior to the 1935 amend-guidance of minors. The section was exment, this section applied to vocational tended by the amendment.

§ 96-25. Acceptance and use of donations.—It shall be lawful for the Employment Service Division to receive, accept, and use, in the name of the people of the State, or any community or municipal corporation, as the donor may designate, by gift or devise, any moneys, buildings, or real estate for the purpose of extending the benefits of this article and for the purpose of giving assistance to deserving maimed or crippled boys and girls through vocational re-

habilitation. (1921, c. 131, s. 7; C. S., s. 7312(g); 1931, c. 312, s. 3; Ex. Sess. 1936, c. 1, s. 12.)

- § 96-26. Co-operation of towns, townships, and counties with Division. — It shall be lawful for the governing authorities of any municipality, county, township, or school corporation in the State to enter into co-operative agreement with the Employment Service Division and to appropriate and expend the necessary money upon such conditions as may be approved by the Employment Service Division and to permit the use of public property for the joint establishment and maintenance of such offices as may be mutually agreed upon, and which will further the purpose of this article. (1921, c. 131, s. 8; C. S., s. 7312-(h); 1931, c. 312, s. 3; 1935, c. 106, s. 5; Ex. Sess. 1936, c. 1, s. 12.)
- § 96-27. Method of handling employment service funds.—All federal funds received by this State under the Wagner-Peyser Act (48 Stat. 113; Title 29, U. S. C., § 49) as amended, and all State funds appropriated or made available to the Employment Service Division shall be paid into the Employment Security Administration Fund, and said moneys are hereby made available to the State employment service to be expended as provided in this article and by said act of Congress. For the purpose of establishing and maintaining free public employment offices, said Division is authorized to enter into agreements with any political subdivision of this State or with any private, nonprofit organization, and as a part of any such agreement the Commission may accept moneys, services, or quarters as a contribution to the Employment Security Administration Fund. (1935, c. 106, s. 7; Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11; 1947, c. 598, s. 1.)

Editor's Note. - The 1941 amendment appear in the section. struck out the words "the special employ-

The 1947 amendment substituted "Emment service account in" formerly preced- ployment Security Administration Fund" ing the words "the Employment Security for "Unemployment Compensation Ad-Administration Fund" the first time they ministration Fund."

§ 96-28. Annual appropriation.—There is hereby appropriated to the Employment Security Commission seventy-five thousand dollars annually, for the purpose of paying the State's contribution towards the expenses of the Employment Service Division. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, s. 12; 1947, c. 598, s. 1.)

Editor's Note. — The 1947 amendment mission" for "Unemployment Compensasubstituted "Employment Security Com- tion Commission."

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Workmen's Compensation Act.

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ARTICLE 1.

Workmen's Compensation Act.

§ 97-1. Official title.—This article shall be known and cited as "The North Carolina Workmen's Compensation Act." (1929, c. 120, s. 1,)

In General.—It was the purpose of the General Assembly in providing for compensation for an employee, that the North Carolina Industrial Commission, created by the Workmen's Compensation Act for that purpose, shall administer its provisions to the end that both employee and employer shall receive the benefits and enjoy the protection of the Act. The Act contemplates mutual concessions by employee and employer; for that reason, its validity has been upheld, and its policy approved. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937).

Purpose of Act. — The primary purpose of legislation of this kind is to compel industry to take care of its own wreckage. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

The general purpose of the Workmen's Compensation Act, in respect to compensation for disability, is to substitute, for common-law or statutory rights of action and grounds of liability, a system of money payments by way of financial relief for loss of capacity to earn wages. There is no compensation provided for physical pain or discomfort. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

It is not the purpose of the Workmen's Compensation Act to exculpate or absolve employers from the consequences of their negligent conduct. Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623 (1938).

Application.—The Workmen's Compensation Act deals with the incidents and risks of the contract of employment, in which is included the negligence of the employer in that relation. It has no application outside the field of industrial accident; and does not intend, by its general terms, to take away common-law or other rights which pertain to the parties as mem-

bers of the general public, disconnected from the employment. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

Constitutionality. — The Workmen's Compensation Act of North Carolina has been held to be constitutional by the Supreme Court of that State, and the Supreme Court of the United States has upned the constitutionality of similar compensation acts. Jenkins v. American Enka Corp., 95 F. (2d) 755 (1938).

The contention that the Workmen's Compensation Act is unconstitutional on the ground that it destroys the right of trial by jury is untenable. McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219 (1940).

Basis of Liability.—The Workmen's Compensation Act takes into consideration certain elements of a mutual concession between the employer and employee by which the question of negligence is eliminated, and liability under the Act rests upon the employer upon the condition precedent of an injury by accident occurring in the course of employment and arising cut of it. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. F. 266 (1930).

Construction.— The Workmen's Compensation Act is to be construed liberally to effectuate the broad intent of the Act to provide compensation for employees sustaining an injury arising out of and in the course of the employment, and no technical or strained construction should be given to defeat this purpose. Johnson v. Asheville Hosiery Company, 199 N. C. 38, 153 S. E. 591 (1930). See Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438 (1936); Barbour v. State Hospital, 213 N. C. 515, 196 S. E. 812 (1938).

The various compensation acts of the different states should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation. Graham v.

Wail, 220 N. C. 84, 16 S. E. (2d) 691

However, the rule of liberal construction cannot be extended beyond the clearly expressed language of the Act. Gilmore v. Hoke County Board of Education, 222 N. C. 358, 23 S. E. (2d) 292 (1942).

Nor can the rule of liberal construction be carried to the point of applying the Act to employments not within its stated scope, or not within its intent or purpose. Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907 (1942).

The provisions of the Workmen's Compensation Act are to be liberally construed to effectuate the legislative intent as gathered from the Act to award compensation for the injury or death of an employee arising out of and in the course of his employment, irrespective of the question of negligence. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 154 S. E. 66 (1930).

The Workmen's Compensation Act must be liberally construed and liberally applied. Thomas v. Raleigh Gas Co., 218 N. C. 429, 11 S. E. (2d) 297 (1940).

The various provisions of the Workmen's Compensation Act are to be construed in their relations to each other as a whole to effectuate the intent of the legislature to provide compensation to an employee for injury arising out of and in the course of his employment. Rice v. Denny Roll & Panel Co., 199 N. C. 154, 154 S. E. 69 (1930).

The Workmen's Compensation Act will be construed as a whole to effectuate the intent of the General Assembly. Morris v. Laughlin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484, 128 A. L. R. 132 (1940).

Jurisdiction.—Findings of fact of the Industrial Commission, supported by competent evidence, were to the effect that de-

fendant's employee was temporarily employed in pumping water from a barge which was being loaded with logs on a navigable river, that the barge careened, that the employee fell or jumped from the shore side of the barge and was actually killed on land as a result of the barge crushing him. It further appeared that the barge was without means of propulsion and was at the time incapable of navigation. and that both the employee and the defendant had accepted, and were amenable to this chapter. It was held that the North Carolina Industrial Commission had jurisdiction to hear and determine the claim for compensation for the employee's death, its jurisdiction not being ousted by the admiralty and maritime jurisdiction of the United States, Johnson v. Foreman-Blades Lbr. Co., 216 N. C. 123, 4 S. E. (2d) 334

The Industrial Commission has exclusive jurisdiction of the rights and remedies herein afforded. Hedgepeth v. Lumbermen's Mut. Cas. Co., 209 N. C. 45, 182 S. E. 704 (1935).

What Law Governs.—The rights of employer, employee, and insurance carrier under a workmen's compensation statute are governed by the law of the state of the statute. Betts v. Southern Ry. Co., 71 F. (2d) 787 (1934).

Judicial Notice.—Our courts will take judicial notice of a public statute of the State, which therefore need not be pleaded, and the North Carolina Workmen's Compensation Act is a public statute. Miller v. Roberts, 212 N. C. 126, 193 S. E. 286

Applied in Davis v. Mecklenburg County, 214 N. C. 469, 199 S. E. 604 (1938).

Cited in Dark v. Johnson, 225 N. C. 651, 36 S. E. (2d) 237 (1945).

§ 97-2. Definitions.—When used in this article, unless the context otherwise requires—

(a) Employment.—The term "employment" includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic services, and an individual sawmill and logging operator with less than ten (10) employees, who saws and logs less than sixty (60) days in any six consecutive months and whose principal business is unrelated to sawmilling or logging.

(b) Employee.—The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the State, the term "employee"

shall include all officers and employees of the State, except only such as are elected by the people, or by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term "employee" shall include all officers and employees thereof, except such as are elected by the people or elected by the council or other governing body of said municipal corporation or political subdivision, who act in purely administrative capacities, and to serve for a definite term of office. The term "employee" shall include members of the North Carolina National Guard, except when called into the service of the United States, and members of the North Carolina State Guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor. The term "employee" shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs. whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full time basis or a part time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment, and notify the board of commissioners of any changes made therein promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents, and other persons to whom compensation may be payable: Provided, that the third and fourth sentences herein shall not apply to Ashe, Avery, Bladen, Carteret, Caswell, Cherokee. Gates, Hyde, Macon, Pender, Perquimans, Union, Watauga and Wilkes counties: Provided, further, that any employee as herein defined of a municipality, county, or of the State of North Carolina while engaged in the discharge of his official duty outside the jurisdictional or territorial limits of the municipality. county, or the State of North Carolina and while acting pursuant to authorization or instruction from any superior officer, shall have the same rights under this article as if such duty or activity were performed within the territorial boundary limits of his employer.

(c) Employer.—The term "employer" means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person. The board of commissioners of each county of the State, for the purposes of this law, shall be considered as "employer" of all deputy sheriffs serving within such county, or persons serving or performing the duties of a deputy sheriff, whether such persons are appointed by the sheriff or by the board of commissioners and whether serving on a fee basis or salary basis. Each county is authorized to insure its compensation liability for deputy sheriffs to the same extent it is authorized to insure other compensation liability for employees thereof: Provided, that the last two sentences herein shall not apply to Ashe, Avery, Bladen, Carteret, Caswell, Cherokee, Gates, Hyde, Macon, Pender, Perquimans, Union, Watauga and Wilkes

ounties.

(d) Person.—The term "person" means individual, partnership, association or

corporation

(e) Average Weekly Wages.—"Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by fifty-two; but if the

injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided. results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the in-

jured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings.

Where a minor employee, under the age of twenty-one years, sustains a permanent disability or dies, the compensation payable for permanent disability or death shall be calculated, first, upon the average weekly wage paid to adult employees employed by the same employer at the time of the accident in a similar or like class of work which the injured minor employee would probably have been promoted to if not injured, or, second, upon such other method as may be used to compute the average weekly wage as will most nearly approximate the amount which the injured employee would be earning as an adult if it were not for the accident. Compensation for temporary total disability shall be computed upon the average weekly wage at the time of the accident, unless the total disability extends more than fifty-two weeks and then the compensation may be increased in proportion to his expected earnings.

(f) Injury.—"Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.

(g) Carrier.—The term "carrier" or "insurer" means any person or fund authorized under § 97-93 to insure under this article, and includes self-insurers.

(h) Commission.—The term "Commission" means the North Carolina In-

dustrial Commission, to be created under the provisions of this article.

(i) Disability.—The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(i) Death.—The term "death" as a basis for a right to compensation means

only death resulting from an injury.
(k) Compensation.—The term "compensation" means the money allowance payable to an employee or to his dependents as provided for in this article, and

includes funeral benefits provided herein.

(1) Child, Grandchild, Brother, Sister.—The term "child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild,"

"brother," and "sister" include only persons who at the time of the death of the

deceased employee are under eighteen years of age.

(m) Parent.—The term "parent" includes stepparents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(n) Widow.—The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart

for justifiable cause or by reason of his desertion at such time.

(o) Widower.—The term "widower" includes only the decedent's husband who at the time of her death lived with her and was dependent for support upon

(p) Adoption.—The term "adoption" or "adopted" means legal adoption prior to the time of the injury.

(a) Singular.—The singular includes the plural and the masculine includes the

feminine and neuter.

(r) Hernia.—In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

First. That there was an injury resulting in hernia or rupture.

Second. That the hernia or rupture appeared suddenly.

Third. That it was accompanied by pain.

Fourth. That the hernia or rupture immediately followed an accident.

Fifth. That the hernia or rupture did not exist prior to the accident for

which compensation is claimed.

All hernia or rupture, inguinal, femeral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury, and compensation paid in accordance with the provisions of § 97-38. In nonfatal cases, if it is shown by special examination, as provided in § 97-27, that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this article.

In case the injured employee refuses to undergo the radical operation for the cure of said hernia or rupture, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease, or is otherwise in such physical condition that the Commission considers it unsafe for the employee to undergo said operation, the employee shall be paid compensation in accordance with the provisions of this article. (1929, c. 120, s. 2; 1933, c. 448; 1939, c. 277, s. 1; 1943, c. 543; c. 672, s. 1; 1945, c.

766; 1947, c. 698; 1949, c. 399.)

I. In General.

II. Employment; Employee; Employer.

III. Average Weekly Wages.

IV. Injury by Accident Arising Out of and in the Course of the Employment.

A. In General.

B. Accident.

C. Arising Out of and in the Course of Employment.

D. Injury from Disease.

V. Disability. VI. Compensation.

Cross Reference.

As to jurisdiction of Commission de-

pendent on showing of employment of five or more, see note to § 97-13.

I. IN GENERAL.

Editor's Note.—The 1933 amendment added to subsection (a) of this section a clause applicable to sawmills and logging

The 1939 amendment inserted the present third and fourth sentences in subsection (b) and added the second and third sentences to subsection (c).

The first 1943 amendment added the first proviso in subsection (b) and the proviso at the end of subsection (c). The second 1943 amendment inserted the second sentence in subsection (b).

The 1945 amendment rewrote the latter part of subsection (a) relating to sawmilling and logging, and added the fourth paragraph of subsection (e). The 1947 amendment inserted in subsection (e) the provision as to subsistence allowance paid to veteran trainees. The 1949 amendment added the last proviso to subsection (b).

For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 495.

Applied in Miller v. Roberts, 212 N. C.

126, 193 S. E. 286 (1937).

Cited in Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536 (1938); Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429, 142 A. L. R. 1033 (1941); Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948); Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

II. EMPLOYMENT; EMPLOYEE; EMPLOYER.

Subsection (a) of This Section Modified by § 97-19.—As a general proposition the only private employments covered by the Workmen's Compensation Act are those "in which five or more employees are regularly employed in the same business or establishment." But this general rule is subject to the exception created by § 97-19, which was manifestly enacted to protect the employees of financially irresponsible subcontractors who do not carry workmen's compensation insurance, and to prevent principle contractors, immediate contractors, and subcontractors from relieving themselves of liability under the Act by doing through subcontractors what they would otherwise do through the agency of direct employees. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Same—Secondary Liability of Contractor to Employees of Subcontractor.—Where a contractor sublets a part of the contract to a subcontractor without requiring from the subcontractor a certificate that he has procured compensation insurance or has satisfied the Industrial Commission of his financial responsibility as a self-insurer under § 97-93, such contractor is properly held secondarily liable for compensation to an employee of the subcontractor, even though the contractor regularly employs less than five employees. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Evidence Sufficient to Show Five or More Persons Regularly Employed.—Evidence tending to show that the employer regularly employed three persons in his

general mercantile business and that for more than two months prior to the accident in suit he had employed two other persons at stated weekly wages to deliver fertilizers by truck in the operation of his mercantile business, supports the finding of the Industrial Commission that the employer had five or more persons regularly employed in his business and that he was therefore subject to the Workmen's Compensation Act. Hunter v. Peirson, 229 N. C. 356, 49 S. E. (2d) 653 (1948).

S. E. (2d) 653 (1948).

"Employee."—Except as to public officers the definition of "employee" contained in this section adds nothing to the common-law meaning of the term. Nor does it encroach upon or limit the common-law meaning of "independent contractor." These terms must be given their natural and ordinary meaning in their accepted legal sense. Hayes v. Board of Trustees, 224 N. C. 11, 29 S. E. (2d) 137

(1944).

One who seeks to avail himself of the Workmen's Compensation Act must come within its terms and must be held to proof that he is in a class embraced in the Act. Hayes v. Board of Trustees, 224 N. C. 11, 29 S. E. (2d) 137 (1944).

What Employees Excluded.—This chapter excludes persons whose employment is casual and not in the course of the trade, business, profession or occupation of the employer, and specifically excepts from its provisions casual employees, farm laborers and domestic servants. Burnett v. Palmer-Lipe Paint Co., 216 N. C. 204, 4 S. E. (2d) 507 (1939).

When Casual Employee Entitled to Compensation.—Section 97-13 of this Act providing that the Act shall not apply to casual employees, is not totally repugnant to this section, providing for compensation for an injury to an employee while "in the course of the trade, business," etc., and an employee is entitled to compensation even if the employment is casual, if he is injured in the course of the trade, business, etc. Johnson v. Asheville Hosiery Co., 199 N. C. 38, 153 S. E. 591 (1930).

The restriction of this Act excluding injuries sustained in casual employment will not exclude an applicant under the provisions of the Act when he sustains injuries in the course of the general trade, business, etc., of the employer and material or expedient therein, and the painting of the interior of a machine room to give the employees therein a better light or for the protection of the permanent structure, is not a casual employment and is one in the general course of business, and the Workmen's Compensation Act applies to an in-

jury received by a workman engaged in such painting. Johnson v. Asheville Hosiery Company, 199 N. C. 38, 153 S. E. 591 (1930).

Employment Is Not Casual because Intermittent.—The Commission has said: "... we must conclude that the legislature did not contemplate an employment to be continuous in order to bring it within the Act, as they certainly would not enact a statute with such requirements that common knowledge would show to be a nullity under such construction." Employment that is definite, whether for a day or for a year, is not casual. 8 N. C. Law Rev. 422.

Employment continuously for five or six weeks in construction of facilities for defendant's plant may not be held to be either casual or not in the course of defendant's business. Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730 (1946).

Decedents Held Not Casual Employees. -The evidence tended to show that the defendant operated a general mercantile business, which included the selling and delivery of commercial fertilizers, and that plaintiffs' intestates had been working for a period of more than two months at stated weekly wages in delivering the fertilizers by truck, when they met with a fatal accident arising out of and in the course of their employment. It was held that decedents were not casual employees, and further, the injury arose within the scope of the employer's regular business, and therefore they were employees of defendant within the coverage of the Workmen's Compensation Act. Hunter v. Peirson, 229 N. C. 356, 49 S. E. (2d) 653 (1948).

Employees and Independent Contractors.—Generally an independent contractor is one who exercises independent employment and contracts to do a piece of work according to his own judgment and method, without being subject to his employer except as to the results of his work. Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730 (1946).

Where evidence tended to show that deceased, a machinist, contracted to construct a conveyor from materials furnished by defendant and in accordance with his rough sketch, hourly wage being basis of pay, and parties appeared to have treated contract as one of employment, such evidence was sufficient to sustain finding of Commission that deceased was employee and not independent contractor. Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730 (1946).

The evidence tended to show that deceased was a licensed contract hauler, and was engaged to haul sand, gravel and con-

crete from defendant's hins to defendant's concrete mixer along a route selected by defendant, but that defendant had no control over the number of hours deceased worked or whether deceased drove his own truck or employed a driver, and that deceased paid for his own gas and oil and made his own repairs to his truck. Deceased was paid a stipulated sum per load and was also paid the hourly wage of truck drivers employed by defendant for time lost waiting in line when the concrete mixer broke down. Deceased was killed when struck by a train at a grade crossing while hauling for defendant on the route selected. It was held that, upon the evidence, deceased was an independent contractor and not an employee within the meaning of this section, and the judgment of the superior court affirming the award of compensation by the Industrial Commission, was reversed. Perley v. Ballenger Paving Co., 228 N. C. 479, 46 S. E. (2d) 298 (1948).

Evidence held sufficient to support findings of Industrial Commission that intestate was an employee within the coverage of the Workmen's Compensation Act and not an independent contractor. Cooper v. Colonial Ice Co., 230 N. C. 43, 51 S. E. (2d) 889 (1949).

The distinction between an independent contractor and an employee entitled to benefits under the Workmen's Compensation Act has frequently been considered by the Supreme Court and applied to the particular circumstances of individual cases. See Cooper v. Colonial Ice Co., 230 N. C. 43, 51 S. E. (2d) 889 (1949), citing Johnson v. Asheville Hosiery Co., 199 N. C. 38, 153 S. E. 591 (1930); Creswell v. Charlotte News Pub. Co., 204 N. C. 380, 168 S. E. 408 (1933); Beach v. McLean, 219 N. C. 521, 14 S. E. (2d) 515 (1941); Hayes v. Board of Trustees of Elon College, 224 N. C. 11, 29 S. E. (2d) 137 (1944); Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730 (1946); Creighton v. Snipes, 227 N. C. 90, 40 S. E. (2d) 612 (1946); Bell v. Williamston Lbr. Co., 227 N. C. 173, 41 S. E. (2d) 281 (1947); Perley v. Ballenger Paving Co., 228 N. C. 479, 46 S. E. (2d) 298 (1948).

Salesman as Employee. — Deceased, at the time of his fatal injury, was engaged in selling the products of defendant. Letters to him from defendant's home office were introduced in evidence which contained instructions for the collection of an account which, as an exception, had been charged directly to the purchaser by defendant, and also a letter stating that defendant would fill his orders C. O. D. without deducting

commissions, and at the end of the week would then figure his commissions and send him a check therefor plus any difference "to make up the \$25.00 salary," and also stating that a certain sum was due for social security and asking for his social security number. It was held that the evidence, with other evidence in the case, was sufficient to support the finding of the Industrial Commission that the deceased was an employee of the defendant, and not a jobber or independent contractor. Cloninger v. Ambrosia Cake Bakery Co., 218 N. C. 26, 9 S. E. (2d) 615 (1940).

A newsboy engaged in selling papers is held not to be an employee of the newspaper within the meaning of that term as used in this section, the newsboy not being on the newspaper's pay roll and being without authority to solicit subscriptions and being free to select his own methods of effecting sales, although some degree of supervision was exercised by the newspaper. Creswell v. Charlotte News Pub. Co., 204 N. C. 380, 168 S. E. 408 (1933).

Whether an injured person is an executive officer or an employee is to be determined by the nature of the act performed by him at the time of the injury, but mere desultory, disconnected, and infrequent acts of manual labor not reasonably required by the exigencies of the situation will not classify an executive officer as an employee in the performance of such acts. Nissen v. Winston-Salem, 206 N. C. 888, 175 S. E. 310 (1934).

Executive Performing Manual Labor.—Where evidence showed claimant went to another city to inspect a job which defendant employer was completing, and did manual labor on the job in installing radiators, and was injured in an automobile accident occurring while he was returning home from the job, it was held that the claimant, at the time of his accidental injury, had not been off on a mission of a purely executive nature, but at the time was doing the work of an ordinary laborer or employee. Rowe v. Rowe-Coward Co., 208 N. C. 484, 181 S. E. 254 (1935).

Under the dual capacity doctrine executive officers of a corporation will not be denied compensation merely because they are executive officers if, as a matter of fact, at the time of the injury they are engaged in performing manual labor or the duties of a workman. To come within this doctrine it is not sufficient to show that an executive officer sustained injuries while performing manual or mechanical labor which was no part of his duties. Nor are desultory, disconnected, infrequent acts of manual labor performed by an executive

sufficient to classify him as a workman when so engaged. The test is, was he at the time of his injury, as a part of his duties, engaged in performing ordinary, detail, mechanical or manual labor or other ordinary duties of a workman? Gassaway v. Gassaway, 220 N. C. 694, 18 S. E. (2d) 120 (1942).

Officer Engaged in Collecting Accounts.—The secretary and treasurer of an automobile sales company who was injured while traveling to collect accounts due the company was an employee of the company within the intent and meaning of this section at the time of the injury. Hunter v. Hunter Auto Co., 204 N. C. 723, 169 S. E. 648 (1933).

An employee of the State engaged in the cultivation of food crops on lands of the State used by the State Hospital is an employee of the State within the coverage of this and § 97-13, and his death from an accident arising out of and in the course of his employment is compensable. Barbour v. State Hospital, 213 N. C. 515, 196 S. E. 812 (1938).

A municipal corporation is subject to the Workmen's Compensation Act. though it employs less than five employees, under this section, the legislative intent to classify municipal corporations with the State and its political subdivisions being consonant with reason and being indicated by § 97-13, which does not include municipal corporations employing less than five employees in listing employers exempt from the Act, and § 97-7, which provides that neither the State nor any municipal corporation nor any subdivision of the State, nor employees of the same, shall have the right to reject the provisions of the Act, and it being required that these sections be construed in pari materia to determine the legislative intent. Rape v. Huntersville, 214 N. C. 505, 199 S. E. 736 (1938).

A worker employed by a city under a contract stipulating the wages to be received by the worker is an employee of the city within the meaning of this section, and the fact that the city obtains the money to pay the wages from the Reconstruction Finance Corporation is immaterial on the question of the relationship between the worker and the city. Mayze v. Forest City, 207 N. C. 168, 176 S. E. 270 (1934).

A county board of education is the sole employer of one under contract to teach vocational agriculture in a county school, where such teacher's salary is paid in part from funds furnished as a gift to such board by the State and federal governments, and, as such sole employer, is liable,

with its insurance carrier, under this chapter for the death of such teacher from an injury by accident arising out of and in the course of his employment. Callihan v. Board of Education, 222 N. C. 381, 23 S. E. (2d) 297 (1942).

A person employed by a graded school district as teacher and director of athletics is an employee of a political subdivision of the State, and is entitled to the benefits of the Compensation Act under this section. Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396 (1934).

Deputy Sheriff as Employee.—The 1939 amendment including deputy sheriffs within the meaning of the term "employee" as used in this section, is not violative of Art. I, § 7 or Art. II, § 29 of the Constitution. Towe v. Yancey County, 224 N. C. 579, 31 S. E. (2d) 754 (1944).

Same - Status before 1939 Amendment. -Before the 1939 amendment to this section it was held that deputy sheriffs were not employees of the sheriff within the meaning of the North Carolina Workmen's Compensation Act, and were not entitled to compensation for injuries resulting from an accident arising out of and in the course of the discharge of their duties, since they occupy a public office and their compensation is fixed and paid as prescribed by statute and not by the sheriff, and the discharge of their duties was not an "employment" within the meaning of that term as used in this section. Borders v. Cline, 212 N. C. 472, 193 S. E. 826 (1937).

Before the 1939 amendment to this section, where a deputy sheriff acting upon his own responsibility and contrary to the instructions of the sheriff received a fatal injury from a person whom he had arrested, it was held that he was not an employee of the county within the meaning of this Act. Saunders v. Allen, 208 N. C. 189, 179 S. E. 754 (1935).

In a case arising before the 1939 amendment to this section, the evidence tended to show that defendant civic association was incorporated to further the interests of the community, and that its charter specifically empowered it to employ deputy sheriffs to act as police in the community under the provisions of law, that intestate was appointed deputy by the sheriff of the county, but was paid by the association, that the association obtained a compensation policy specifically covering intestate, and that intestate was killed while serving a warrant in the community in the performance of his duties. It was held that the evidence was sufficient to support the finding of the Industrial Commission that at the time intestate was an employee of the

civic association, and the association and its insurance carrier are liable for the payment of the award rendered in favor of intestate's dependents. Clark v. Sheffield, 216 N. C. 375, 5 S. E. (2d) 133 (1939).

In a case that arose before the 1939 amendment to this section, where the evidence tended to show that the deceased employee had been appointed by the sheriff as a deputy and had been employed by the county as a jailer, that while in the jail he was advised that a man in the vicinity of the jail had shot his wife, that he left the jail and was killed while attempting to arrest the man as he was preparing to flee, it was held that the employee, in attempting to make the arrest, was acting in his capacity as deputy sheriff, such act being outside the scope of his employment as jailer. and the evidence was insufficient to support a finding by the Industrial Commission that he was fatally injured in an accident arising out of and in the course of his employment as jailer. Gowens v. Alamance County, 216 N. C. 107, 3 S. E. (2d) 339 (1939).

Same — 1939 Amendment Not Retroactive.—The provision of c. 277, Laws of 1939, that deputy sheriffs shall be deemed employees of the county for the purpose of determining the rights of the parties under the Workmen's Compensation Act, does not apply to accidents occurring prior to the enactment of the amendment. Clark v. Sheffield, 216 N. C. 375, 5 S. E. (2d) 133 (1939).

Injury to Deputized Policeman Aiding in Arrest.—Evidence that claimant was injured while attempting to aid a policeman in serving a warrant for breach of the peace, and that claimant had been duly deputized by the policeman to aid in making the arrest, was sufficient to support the finding of the Industrial Commission that at the time of injury claimant was an employee of defendant town under a valid appointment. Tomlinson v. Norwood, 208 N. C. 716, 182 S. E. 659 (1935).

Injury to Policeman Pursuing Offender Beyond Jurisdiction.—Note the effect of the 1949 amendment to subsection (b) of this section. The two cases cited below were decided prior to the amendment.

Where a policeman, in an effort to arrest without warrant a person who had in his presence committed an offense less than a felony, pursued such person beyond the boundaries of the town or district in which by statute he was authorized to act and, in such pursuit, was injured by accident outside of such boundaries, it was held that injuries so suffered did not arise out of and in the course of his employment. Wil-

son v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907 (1942)

Evidence tending to show that deceased employee, a township constable, was also employed by a municipality of the township to maintain order in its business district during certain hours of the night, and that prior to the hours of his employment by the town, a policeman of the municipality, who knew he was a constable but did not know of his employment by the town, requested him to go with him on a call outside the limits of the town, and that there he was fatally injured in attempting to make an arrest, was held to show that the fatal injury did not arise in the course of his employment by the municipality. Taylor v. Wake Forest, 228 N. C. 346. 45 S. E. (2d) 387 (1947).

Person Receiving Federal Relief Not an Employee.—A person furnished work for the relief of himself and family and paid with funds provided by the Federal Relief Administration is not an "employee" of the relief administrative agencies within the meaning of this section. Jackson v. North Carolina Emergency Relief Administration, 206 N. C. 274, 173 S. E. 580 (1934). See Barnhardt v. Concord, 213 N. C. 364, 196 S. E. 310 (1938).

III. AVERAGE WEEKLY WAGES.

When Special Method of Computation Employed. - When, in determining the amount to be awarded the dependents of a deceased employee, the methods of computing the "average weekly wage" enumerated in the first paragraph of subsection (e) of this section would be unfair because of exceptional circumstances, the Industrial Commission is authorized by the second paragraph of said subsection to use such other method of computation as would most nearly approximate the amount which the employee would be earning if living, and the provisions of the second paragraph of the subsection apply to all three of the methods of computation enumerated in the first paragraph, and such other method of computation may be invoked for exceptional reasons even though the employee had been constantly employed by the employer for fifty-two weeks prior to the time of the injury causing death. Early v. Basnight & Co., 214 N. C. 103, 198 S. E. 577 (1938).

Award Based on Total Compensation Customarily Earned.—Claimant was employed as janitor, his compensation for such work being paid in part by the State School Commission, and was also employed in school maintenance work, his compensation for the maintenance work

being paid exclusively by the municipal board of education. He was injured while engaged in duties pertaining exclusively to school maintenance work. It was held that an award computed on the basis of the total compensation customarily earned by claimant, rather than the compensation earned solely in school maintenance work, upon the Commission's finding of exceptional conditions, was proper. Casey v. Board of Education, 219 N. C. 739, 14 S. E. (2d) 853 (1941).

Effect of Pay Increases within Fifty-Two Weeks.—Plaintiff was employed practically continuously for thirty-three weeks prior to the injury resulting in death, but during that period his wages were twice increased. In the absence of a finding supported by evidence that the average weekly wage for the entire period of employment would be unfair, compensation should have been based thereon, and the computation of the average weekly wage on the basis of the wage during the period after the last increase in pay is not supported by the evidence. Mion v. Atlantic Marble, etc., Co., 217 N. C. 743, 9 S. E. (2d) 501 (1940).

"Exceptional Reasons" Justifying Special Method of Computation. - The Industrial Commission found upon supporting evidence that the deceased employee had been employed by defendant employer for a number of years, that he had been promoted successively from truck driver to stock clerk to salesman with increased wages from time to time, and that he had been given a raise in the last position less than three months prior to the time of injury resulting in death, part of the supporting evidence being testimony by the employee's superior that "with the business he was getting" he would have had further increases. It was held that the findings were sufficient in law to constitute "exceptional reasons" within the meaning of subsection (e) of this section, and the employee's "average weekly wage" was properly fixed at the amount he was earning weekly at the time of the injury, it being patent that the wages he was then receiving were not temporary and uncertain, but constituted a fair basis upon which to compute the award to his dependents. Early v. Basnight & Co., 214 N. C. 103, 198 S. E.

IV. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

A. In General.

The threefold conditions antecedent to the right to compensation under the North

577 (1938).

Carolina Workmen's Compensation Act are, namely: (1) That claimant suffered a personal injury by accident; (2) that such injury arose in the course of the employment; and (3) that such injury arose out of the employment. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

The condition antecedent to compensation is the occurrence of an injury (1) by accident (2) arising out of, and (3) in the course of, employment. Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907 (1942).

An injury compensable under the Workmen's Compensation Act must be the result of an accident which arises out of and in the course of the employment. Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387 (1947).

A compensable death is one which results from an injury by accident arising out of and in the course of the employment. There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable under our statute. Slade v. Willis Hosiery Mills, 209 N. C. 823, 184 S. E. 844 (1936). See also, Ashley v. F-W Chevrolet Co., 222 N. C. 25, 21 S. E. (2d) 834 (1942); Gilmore v. Hoke County Board of Education, 222 N. C. 358, 23 S. E. (2d) 292 (1942).

In order for the death of an employee to be compensable it must result from an injury by accident arising out of and in the course of the employment. McGill v. Lumberton, 215 N. C. 752, 3 S. E. (2d) 324 (1939).

When Industrial Commission's Findings Conclusive.—Where there is any competent evidence in support of the finding of the Industrial Commission that the accident in question arose out of and in the course of employment, the finding is conclusive on the courts upon appeal. Latham v. Southern Fish, etc., Co., 208 N. C. 505, 181 S. E. 640 (1935).

Where the evidence is such that several inferences appear equally plausible, the finding of the Industrial Commission is conclusive on appeal, and courts are not at liberty to reweigh the evidence and set aside the finding simply because other conclusions might have been reached. Rewis v. New York Life Ins. Co., 226 N. C. 325, 38 S. E. (2d) 97 (1946).

The finding of fact of the Industrial Commission that the disease causing an employee's death resulted naturally and unavoidably from an accident is conclusive on appeal when supported by competent evidence. Doggett v. South Atlantic Ware-

house Co., 212 N. C. 599, 194 S. E. 111 (1937).

When Findings Reviewable on Appeal.—If there was no conflicting evidence and the Industrial Commission decided as a matter of law that there was no sufficient competent evidence that the injury to plaintiff was "by accident arising out of and in the course of employment," the question is one of law and is reviewable by the court upon appeal. Massey v. Board of Education, 204 N. C. 193, 167 S. E. 695 (1933).

Where Record Silent as to Material Fact at Issue.—Where in proceedings under this Act there is no finding or adjudication in reference to the contention of the employer that the claimant's injury was occasioned by his willful intention to injure his assailant, a fellow servant, the cause will be remanded for a definite determination of the question. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930).

B. Accident.

An injury, in order to be compensable, must result from an accident, and injuries which are not the result of any fortuitous occurrence but are the natural and probable result of the employment are not compensable. Smith v. Cabarrus Creamery Co., 217 N. C. 468, 8 S. E. (2d) 231 (1940). "Accident" Defined. — An "accident"

"Accident" Defined. — An "accident" within the meaning of this Act is an unlooked for and untoward event which is not expected or designed by the injured employee. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930); McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509 (1934); Slade v. Willis Hosiery Mills, 209 N. C. 823, 184 S. E. 844 (1936); Love v. Lumberton, 215 N. C. 28, 1 S. E. (2d) 121 (1939); Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. (2d) 320 (1944); Edwards v. Piedmont Pub. Co., 227 N. C. 184, 41 S. E. (2d) 592 (1947); Gabriel v. Newton, 227 N. C. 314, 42 S. E. (2d) 96 (1947).

An "accident" within the contemplation of this chapter is an unusual and unexpected or fortuitous occurrence, there being no indication that the legislature intended to put upon the usual definition of this term any further refinements. Smith v. Cabarrus Creamery Co., 217 N. C. 468, 8 S. E. (2d) 231 (1940).

Death from injury by accident implies a result produced by a fortuitous cause. Slade v. Willis Hosiery Mills, 209 N. C. 823, 184 S. E. 844 (1936).

An assault is an "accident" within the meaning of the Workmen's Compensation Act, when from the point of view of

the workman who suffers from it it is unexpected and without design on his part, although intentionally caused by another. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

The mere fact that the injury is the result of a willful and criminal assault of a fellow servant does not of itself prevent the injury from being accidental. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723,

153 S. E. 266 (1930).

Death of a fireman from heart failure brought on by excitement and exhaustion in fighting a fire, is not the result of an accident within the meaning of the Workmen's Compensation Act, heat, smoke, excitement, and physical exertion being the ordinary and expected incidents of the employment. Neely v. Statesville, 212 N. C. 365, 193 S. E. 664 (1937).

Rupture of Intervertebral Disc. - The evidence tended to show that employee lifted a plate weighing 40 or 50 pounds in the regular and usual course of his employment, and while handing it to the pressman with his body in a twisted position, felt a sharp pain. Expert testimony was introduced to the effect that the employee had ruptured an intervertebral disc and that the lifting of the weight in the manner described was sufficient to have produced the injury. Plaintiff employee admitted that on two different occasions, several years previously, when he arose from a sitting position he had a catch in his back. It was held that the evidence is sufficient to support the finding of the Industrial Commission that the injury resulted from an accident. Edwards v. Piedmont Pub. Co., 227 N. C. 184, 41 S. E. (2d) 592 (1947).

Hernia.—It is sufficient for the Commission to find the facts required under this section and award compensation if the pain immediately followed the accident although the hernia was not discovered until diagnosis by a physician some days thereafter. Ussery v. Erlanger Cotton Mills, 201 N. C.

688, 161 S. E. 307 (1931).

In Moore v. Engineer, etc., Co., 214 N. C. 424, 199 S. E. 605 (1938), it was held that claimant's injury resulted from an accident within the contemplation of the Compensation Act and that the evidence justified the Industrial Commission in finding that hernia appeared "suddenly" within the meaning of this section.

The evidence tended to show that the injured employee was employed to deliver milk, that in delivering milk to a cafe in the regular course of his employment he attempted to lift a box containing chipped ice, and weighing from 125 to 150 pounds, out of a larger box in order to place the

milk he was delivering beneath it, that while lifting the box he felt a sharp pain and that it was later determined that he had suffered a hernia. The evidence is sufficient to sustain the finding of the Industrial Commission that the injury resulted from an accident, since it resulted from an unusual and fortuitous occurrence happening within the body of the employee, which was not a natural and probable result of his employment. Smith v. Cabarrus Creamery Co., 217 N. C. 468, 8 S. E. (2d) 231 (1940).

Injury Produced by Inhaling Asbestos Dust.—The word "accident" within the meaning of this Act should be construed in its wide and practical sense to give effect to the intent of the Act, and an injury produced by inhaling asbestos dust for a period of five months is an accidental injury within the terms of this section, the test being not the amount of time taken to produce the injury but whether it was produced by unexpected and unforeseen, and therefore, accidental means. McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509 (1934). As to compensation for occupational diseases, see §§ 97-52 to 97-76.

Injury Not Resulting from Accident.—The Industrial Commission found, upon supporting evidence, that claimant became temporarily sick and blind while performing usual manual labor in the usual manner, that his condition improved and he went back to work and that shortly thereafter he again suffered a similar disability. The findings support the conclusion that the injury did not result from an accident arising out of and in the course of claimant's employment within the purview of this chapter. Buchanan v. State Highway, etc., Comm., 217 N. C. 173, 7 S. E. (2d) 382 (1940).

C. Arising Out of and in the Course of Employment.

Editor's Note.— For note on accidents arising out of and in the course of employment of traveling employees, see 23 N. C. Law Rev. 159.

This chapter does not contemplate compensation for every injury an employee may receive during the course of his employment but only those from accidents arising out of, as well as in the course of, employment. Where an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment or from a hazard common to others, it does not arise out of the employment. The causative danger must be peculiar to the work and not common to the

neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. Bryan v. Loving Co., 222 N. C. 724, 24 S. E. (2d) 751 (1943).

Injuries by accident arising out of and in the course of the employment are compensable (Love v. Lumberton, 215 N. C. 28, 1 S. E. (2d) 121 (1939)) regardless of whether the accident was the result of the employer's negligence, but injuries not resulting from an accident arising out of and in the course of the employment, and diseases which do not result naturally and unavoidably from an accident are not compensable. Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809 (1937).

This definition presents a double aspect. "In the course of" refers to the time, place and circumstances under which the accident occurred. This is, in most cases, a fairly simple question. The real difficulty arises in determining whether the accident is one "arising out of the employment." That this is considered as a mixed question of law and fact makes the problem all the more difficult. In the final analysis it means that there must be apparent "to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." For instance, an injury occasioned by an assault of a co-employee and growing out of differences in regard to the employment was held to be within the definition. But where the assault grew out of personal malice unconnected with the employment, no compensation was awarded. In the further case of an unprovoked assault by a third person upon an employee, the risk having arisen out of the employment, a recovery was allowed. Moreover, if the injury occurs from a prank played by a fellow workman, compensation is given. But if the injured employee engaged in the play, no recovery is permitted. 8 N. C. Law Rev. 418.

Determination Depends on Facts of Each Case.—The question of whether compensation is recoverable under this Act depends upon whether the accident complained of arises out of and in the course of the employment of the one injured, and its determination depends largely upon the facts of each particular case as matters of fact and conclusions of law, and general definitions are unsatisfactory. Harden v. Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 728 (1930).

Common-Law Rules Inapplicable.—The words "out of and in the course of the employment," used in connection with injuries

compensable thereunder, are not to be construed by the rules controlling in negligent default cases at common law, but an accidental injury is compensable thereunder if there is a causal relation between the employment and injury, if the injury is one which, after the event, may be seen to have had its origin in the employment, and it need not be shown that it is one which ought to have been foreseen or expected. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930); Ashley v. F-W Chevrolet Co., 222 N. C. 25, 21 S. E. (2d) 834 (1942).

"Out of" and "in the Course of" Distinguished.—The words "out of" refer to the origin or cause of the accident. The words "in the course of" refer to the time, place, and circumstances under which an accident occurs. Plemmons v. White's Service, 213 N. C. 148, 195 S. E. 370 (1938); Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907 (1942); Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. (2d) 320 (1944); Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387 (1947); Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

These terms have been so often defined by the Supreme Court that they now have an established and well recognized meaning. Bryan v. Loving Co., 222 N. C. 724, 24 S. E. (2d) 751 (1943).

An injury compensable under subsection (f) of this section, is one by accident arising out of and in the course of the employment, the words "out of" referring to the origin or cause of the accident, and the words "in the course of" to the time, place and circumstances under which the accident occurred. Ridout v. Rose's 5-10-25c Stores, 205 N. C. 423, 171 S. E. 642 (1933).

"In the Course of" the Employment.—
The finding that the claimant's injury arose in the course of the employment was required by the evidence that it occurred during the hours of the employment and at the place of the employment while the claimant was actually engaged in the performance of the duties of the employment. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Whether an accident arises "out of the employment" is a mixed question of law and fact to be determined in the light of the facts and circumstances of each case, but the term requires that there be some causal connection between the injury and the employment or that the risk be incidental to the employment. Ridout v. Rose's 5-10-25c Stores, 205 N. C. 423, 171 S. E. 642 (1933).

"Arising Out of" Defined.-"Arising out

of' has been defined to mean coming from the work the employee is to do, or out of the services he is to perform, and as a natural result of one of the risks of the employment. The injury must spring from the employment or have its origin therein. Bolling v. Belkwhite Co., 228 N. C. 749, 46 S. E. (2d) 838 (1948).

The accident "arises out of" the employment when it occurs in the course of the employment and is the result of a risk involved therein or incident thereto, or to the conditions under which it is required to be performed. There must be some causal connection between the employment and the injury. Bolling v. Belkwhite Co., 228 N. C. 749, 46 S. E. (2d) 838 (1948).

An injury "arises out of" the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment. Rewis v. New York Life Ins. Co., 226 N. C. 325, 38 S. E. (2d) 97 (1946); Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

The term "arising out of the employment" within the meaning of the Workmen's Compensation Act refers to the origin or cause of the accident, and while it must be interpreted in the light of the facts and circumstances of each case and may not be precisely defined, there must be some causal connection between the injury and the employment. Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387 (1947).

The test for determining whether an accidental injury arises out of an employment is this: "There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected." Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Injury Suffered Going to or Returning from Work.—As a general rule an injury suffered by an employee while going to or returning from his work does not arise out of and in the course of his employment. Bray v. Weatherly & Co., 203 N. C. 160, 165 S. E. 332 (1932).

Where the evidence showed that a policeman was killed in an accident, while returning to work from a leave of absence, the conclusion that he did not sustain injury by accident arising out of and in the course of his employment was sustained.

McKenzie v. Gastonia, 222 N. C. 328, 22 S. E. (2d) 712 (1942).

Where the evidence tended to show that plaintiff's intestate, a civilian guard of a construction company, stationed at a main gate of a marine base to direct traffic and parking about such gate and on the highway immediately adjoining, was at the time of the accident on his way to his place of employment to report for work and was killed, after alighting from a bus, on the public highway immediately in front of such main gate, as he attempted to cross the highway ahead of an oncoming car, an award was error, as deceased was not on the premises of his employer and his injury and death did not arise out of and in the course of his employment, Bryan v. Loving Co., 222 N. C. 724, 24 S. E. (2d) 751 (1943).

Where Employer Furnishes Transportation as Incident to Contract of Employment.—While ordinarily an employer is not liable under this chapter for an injury suffered by an employee while going to or returning from work, the employer may be held liable when he furnishes the means of transportation as an incident to the contract of employment. Smith v. Gastonia, 216 N. C. 517, 5 S. E. (2d) 540 (1939).

Where an employer was under obligation to transport its employees from the woods where they worked to a camp, and provided for that purpose a safety car attached to its railroad train, having forbidden its employees to use the more hazardous log train, and deceased was killed in attempting to get on the log train and thus return to camp, the employee was killed as result of injury by accident arising out of and in the course of his employment. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834 (1943).

The evidence tended to show that defendant's employees were required to check in at the office in the morning, were then transported to the job, and after completion of the day's work were transported back to the office where they received instructions as to the next day's work before checking out, their working time being computed from the time of checking in until the time of checking out, that on the date in question they were carried to the job in a truck, but that the president's car was sent to bring them back because of rain, that when deceased started to get in the car there were already six persons, including the driver, in the car, that the foreman said he could crowd in the car or ride in with another employee who was driving his own car, and deceased rode in with the other employee, and was fatally injured in an accident occurring after they had reached the city in which defendant's place of business was maintained and while they were on their way to defendant's office to check out. The evidence was sufficient to support the finding of the Industrial Commission that death resulted from an accident arising out of and in the course of the employment, the general rule of nonliability for an accident occurring while an employee is being transported to or from work in a conveyance of a third person over which the employer has no control, not being applicable upon the evidence. Mion v. Atlantic Marble, etc., Co., 217 N. C. 743, 9 S. E. (2d) 501 (1940).

Transportation Furnished in Accordance with Custom.—Where employer hired two employees to ride on truck to help the driver unload and, on the last trip, the driver consented to let the employees off at the place on his route nearest their homes, in accordance with established custom, and one of the employees attempted to alight before the truck had completely stopped, contrary to express orders, and fell to his mortal injury, the evidence was sufficient to sustain the finding that the accident arose out of and in the course of the employment. Latham v. Southern Fish, etc., Co., 208 N. C. 505, 181 S. E. 640 (1935).

Employee Need Not Be in Exact Spot Designated by Employer.— The Workmen's Compensation Act must be liberally construed, and the term "out of the employment" will not preclude recovery for an accident occurring while an employee is not in the exact spot designated by the employer if the employee is at the place he is required to be in the performance of his duties. Howell v. Standard Ice, etc., Co., 226 N. C. 730, 40 S. E. (2d) 197 (1946).

Need Not Be Actually Engaged in Performance of His Duties.—The fact that deceased was not actually engaged in the performance of his duties as watchman, at the time he was pushed over and injured unintentionally by a fellow employee in a hurry, does not perforce defeat his claim for compensation under this Act where both employees had checked in for work, were on the premises and where they had a right to be. Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. (2d) 320 (1944).

Evidence that claimant was not sure that the mill in which he was employed would be operated on the day in question and that he rode to work with another employee, requesting his son to follow in his car to ride him home in case the mill was not operated, and that upon getting to work and ascertaining that the mill would be operated, he put his lunch in the room where he worked and went to a platform

at the front of the mill to tell his son not to wait for him, and that he there slipped on ice and fell to his injury is sufficient to support the finding that the injury resulted from an accident arising out of and in the course of his employment. Gordon v. Thomasville Chair Co., 205 N. C. 739, 172 S. E. 485 (1934).

Acts which are necessary to the health and comfort of an employee while at work, though personal to himself and not technically acts of service, such as visits to the washroom, are incidental to the employment. Rewis v. New York Life Ins. Co., 226 N. C. 225, 38 S. E. (2d) 97 (1946).

Evidence tending to show that the employee was suffering from a disease which weakened him and subjected him to frequent fainting spells, that during the course of his employment he went to the men's washroom, and while there felt faint, and in seeking fresh air, went to the open window, slipped on the tile floor, and fell through the window to his death, held sufficient to support the finding of the Industrial Commission that his death was the result of an accident arising out of and in the course of his employment. Rewis v. New York Life Ins. Co., 226 N. C. 325, 38 S. E. (2d) 97 (1946).

Voluntarily Helping Another Employee. -Claimant was employed as a lumber piler and was instructed to stay away from the saws, but there was evidence that on the day of his injury he was instructed to leave his regular job and to perform some work in the vicinity of one of the saws, and that while waiting at the place designated he started to assist another employee, in the absence of the regular sawyer, in cutting off a board, and suffered an injury when his hand came in contract with the saw. Two men were usually required to operate the saw. The court held that the evidence was sufficient to sustain the finding of the Industrial Commission that the injury arose out of and in the course of his employment. Riddick v. Richmond Cedar Works, 227 N. C. 647, 43 S. E. (2d) 850 (1947).

Deviation from or Abandonment of Employment.—The findings of fact of the Industrial Commission, supported by the evidence, were to the effect that deceased employee was a night watchman, that his duties were to make periodic inspection and to attend the furnaces and to get up steam, that on the night in question he procured his son to help him, that he instructed his son to do certain of his duties in the boiler room, that he placed a small box and plank on a walkway eight or nine feet high, with one end of the plank resting on the box,

and laid down on the plank, that his son called him in time to make a periodic inspection some thirty minutes later, and that in getting up from his recumbent position, while his son was engaged in the performance of the employee's active duties in the boiler room, the employee fell from the walkway and was fatally injured. The facts did not compel the conclusion, as a matter of law, that at the time of injury the employee had not deviated from or abandoned his employment, and therefore the award of the Industrial Commission compensation was upheld. Stallcup v. Carolina Wood Turning Co., 217 N. C. 302, 7 S. E. (2d) 550 (1940).

Employee Mowing Lawn at Employer's Residence.—Where the claimant was employed to drive a delivery truck and to do janitorial work both in the employer's place of business and at the employer's home, and was injured while mowing the lawn at the employer's residence, the injury was not compensable, and was not covered by a compensation insurance policy which provided coverage solely in connection with the employer's business having a definite location. Burnett v. Palmer-Lipe Paint Co., 216 N. C. 204, 4 S. E. (2d) 507 (1939).

Attending a good will picnic at the invitation of the employer was held not to invoke the relation of the master and servant where the employee did no work and was not paid for attendance, nor penalized for nonattendance, nor ordered to go. Barger v. Minges, 223 N. C. 213, 25 S. E. (2d)

837 (1943).

Injury to Salesman on Week-End Trip.
—Evidence that plaintiff, a traveling salesman, used his employer's car for a weekend trip and was injured in a wreck in returning was held to support the finding of the Industrial Commission that the accident did not arise out of and in the course of the employment, notwithstanding that the injured employee, at the destination of the trip, met and conversed with a representative of the employer without appointment or direction of the employer, primarily in regard to a personal matter. Porter v. Noland Co., 215 N. C. 724, 2 S. E. (2d) 853 (1939).

Where the employment subjects a workman to a special or particular hazard from the elements, such as excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts. On the other hand, where the employee is not by reason of his work peculiarly exposed to injury by sunstroke or freezing, such injuries are not

ordinarily compensable. The test is whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be exposed. Fields v. Tompkins-Johnston Plumbing Co., 224 N. C. 841, 32 S. E. (2d) 623 (1945).

Death from Heat Exhaustion or Sunstroke.—Determination of the Industrial Commission that employee's death resulting from heat exhaustion or sunstroke was an injury which arose out of and in course of employment, was held supported by the evidence, where evidence showed that the general outside temperature was 104° Fahrenheit, and employee's work required that he be in close proximity to melted lead which increased the temperature in the partly finished building where employee was working on day of his death. Fields v. Tompkins-Johnston Plumbing Co., 224 N. C. 841, 32 S. E. (2d) 623 (1945).

Claimant was in the plant of his employer when it was struck by a tornado and was injured as a result of the partial collapse of the building. It was held that the accident resulting in the injury did not arise out of the employment, there being no causal relation between the employment and the accident. Walker v. Wilkins, 212

N. C. 627, 194 S. E. 89 (1937).

Death from Bite of Mad Dog.—Where intestate died of hydrophobia resulting from a dog bite received by him while engaged in his duties as attendant in a filling station, it was held that claimant was not entitled to compensation for the employee's death, since there was no causal connection between the employment and the bite of a dog running at large, and the accident was not from a risk incidental to the employment. Plemmons v. White's Service, 213 N. C. 148, 195 S. E. 370 (1938).

Truck Driver Injured by Baseball.— Where a deliveryman was driving a truck in the course of his employment and, while passing a group of boys playing baseball, a baseball struck the windshield and a piece of glass from the windshield struck him in the eye, resulting in serious injury, it was held that the injury resulted from an accident arising out of and in the course of the employment, within the meaning of this section. Perkins v. Sprott, 207 N. C. 462, 177 S. E. 404 (1934).

Assault "Arising Out of and in the Course of" Employment.—Where in a proceeding under this Act the evidence tends to show that the employee was a moulder in the employer's foundry, and that he struck his negro assistant with a shovel after the assistant had spoken words to him he deemed insulting, whereupon the assistant left the employment and returned and shot the

claimant while he was doing his work, causing permanent injury, the evidence is sufficient to bring the case within the intent and meaning of the terms "injury by accident arising out of and in the course of the employment." Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930).

Assault Arising from Dispute over Work.—Where the evidence discloses that two employees had no personal contacts outside of the employment, and there was evidence that the dispute between them arose over the work they were performing for their common employer, the evidence was sufficient to sustain the finding by the Industrial Commission that an assault made by the one upon the other arose out of the employment. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Where a workman is injured by a fellow employee because of a dispute about the manner of doing the work he is employed to do, the accident to the injured workman grows out of the employment and is compensable. Withers v. Black, 230 N. C. 428,

53 S. E. (2d) 668 (1949).

Where there was friction and enmity between two employees, growing out of criticism of the work of one of them by the other and complaint thereof to the employer, and the employee whose work was criticised assaulted his fellow worker from anger and revenge over such criticism, which resulted in the death of the one assaulted, such death occurred from an accident in the course of the employment. Hegler v. Cannon Mills Co., 224 N. C. 669, 31 S. E. (2d) 918 (1944).

Assault upon Employee Collecting Accounts.-Where there is evidence that it was the employee's duty to collect accounts of his employer for goods sold upon the installment plan and that the employee endeavored to collect an account from a debtor and was struck by another also owing an account to the employer, the injury resulting in death, the evidence is sufficient to sustain a finding by the Industrial Commission that the injury was the result of an accident arising out of and in the course of the employment, and such a finding of fact is conclusive and binding. Winberry v. Farley Stores, 204 N. C. 79, 167 S. E. 475 (1933).

Dispute over Matters Foreign to Employment.—Evidence tending to show that a night watchman employed to watch over one section of a highway under construction came over to a night watchman employed to watch over another section thereof, and engaged in an altercation relating to matters foreign to the employment, and

that one of them killed the other as a result thereof, is sufficient to support the finding of the Industrial Commission that the deceased's death was not the result of an accident arising out of and in the course of the employment, and therefore such finding is conclusive on the courts. Mc-Neill v. Ragland Const. Co., 216 N. C. 744, 6 S. E. (2d) 491 (1940).

If one employee assaults another solely from anger, hatred, revenge, or vindictiveness, not growing out of or as an incident to the employment, the injury is to be attributed to the voluntary act of the assailant, and not as an incident of the employment. But if the assault is incidental to some duty of the employment, the injuries suffered thereby may properly be said to arise out of the employment. Ashley v. F-W Chevrolet Co., 222 N. C. 25, 21 S. E. (2d) 834 (1942), wherein finding held to sustain award.

Killing as Result of Personal Enmity Alone.—In order for compensation to be recovered for the death of an employee under this Act it is required that the injury causing death result from an accident arising out of and in the course of the employment, as a proximate cause, and where compensation is sought for the killing of one employee by another for purely personal and unrelated grounds, or when one was employed at night and the other by day, and the killing at night was a result of personal enmity alone, and these facts are found by the Commission and approved by the trial judge, the judgment denying the right of compensation will be affirmed on appeal. Harden v. Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 728 (1930).

Evidence tending to show that deceased came to his death as a result of a pistol wound while at a place where he had a right to be in the course of his employment, without evidence that he was authorized to keep a pistol or use it in the business of the employer, is insufficient to support an award of compensation on the ground that in the absence of a showing of suicide it will be presumed that the death resulted from an accident, since, even so, there is neither presumption nor evidence to support the necessary basis for compensation that the accident arose out of the employment. Bolling v. Belkwhite Co., 228 N. C. 749, 46 S. E. (2d) 838 (1948).

Death of Policeman from Pistol Shot.— Where claimants' evidence tended to show that deceased was employed as chief of police of defendant municipality and that deceased died as a result of a shot from a pistol while he was in office, proof of death by violence raises a presumption of accidental death, casting the burden of going forward with the evidence upon the employer and insurance carrier to show that deceased killed himself, when relied on by them, and claimants' evidence is sufficient to support the finding of the Industrial Commission that death resulted from an accident arising out of and in the course of the employment. McGill v. Lumberton, 218 N. C. 586, 11 S. E. (2d) 873 (1940).

If an employee is injured as a result of the horse-play of a fellow-workman the injured employee is not precluded from recovering his damages under this Act if he did not participate therein. Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594 (1930).

In construing subsection (f) of this section the words "arising out of the employment" in regard to injuries compensable are broad and comprehensive, and must be determined in the light and circumstances of each case, and the Act, applying only to industries employing more than five workmen, contemplates the gathering together of workmen of varying characteristics, and the risks and hazards of such close contact, joking and pranks by the workmen, are incidents to the business and grow out of it, and are ordinary risks assumed by the employer under the Act. Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594 (1930). See also, Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907 (1942).

Evidence Held Insufficient.—In Plyler v. Charlotte Country Club, 214 N. C. 453, 199 S. E. 622 (1938), the evidence was insufficient to support finding that injury arose out of employment.

D. Injury from Disease.

Injury from Occupational Disease.—Where claimant worked in an asbestos plant for six or seven years, and a dust removing system was not installed until about a year before claimant's discharge when a medical examination disclosed that he was suffering from asbestosis, the evidence shows the injury was the result of an occupational disease not compensable under the Workmen's Compensation Act prior to its amendment by Laws 1935, c. 123. Swink v. Carolina Asbestos Co., 210 N. C. 303, 186 S. E. 258 (1936). See §§ 97-52 to 97-76.

Compensation for Disease Resulting from Accident Not Precluded.—Section 97-52, providing that only the occupational diseases therein specified should be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and condi-

tions inherent and usual in the nature of the employment, and this section does not preclude compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment. MacRae v. Unemployment Comm., 217 N. C. 769, 9 S. E. (2d) 595 (1940).

Hemorrhagic Pachymeningitis Resulting from Blow on Head.—Plaintiff while about his employer's business, was struck on the back of the head by hides he was jerking from hooks about ten feet from the floor, and had to stop work for a very short time. As a result of the blow plaintiff contracted hemorrhagic pachymeningitis which caused his total disability. It was held to be an injury by accident, arising out of and in the course of his employment within this section. Eller v. Lawrence Leather Co., 222 N. C. 23, 21 S. E. (2d) 809 (1942).

Accident and Exposure as Contributing to Death from Acute Nephritis .- The evidence before the Industrial Commission tended to show that the deceased employee. for whose death compensation was sought. had been in exceptionally good health up to the time of the accident, that he fell from a platform, breaking his leg, and lay where he fell for about a half hour, exposed to the cool weather, that he was then discovered and carried into the office, where he had to wait some two hours for medical attention. There was expert testimony to the effect that the exposure was a contributing factor causing acute nephritis resulting in death, and that the accident and exposure accelerated the employee's death. It was held that the evidence was sufficient to support the finding of the Industrial Commission that the disease resulted naturally and unavoidably from the accident. Doggett v. South Atlantic Warehouse Co., 212 N. C. 599, 194 S. E. 111 (1937).

Gonorrhea Ophthalmia Resulting from Accident.—The definition of injury given in § 97-2 (f) also provides that it "shall not include a disease in any form, except where it results naturally and unavoidably from the accident." In applying this to the following case the Commission evinced a willingness to construe definitions liberally. Plaintiff, a truck driver, sustained an injury to his eye while cleaning a carburetor. The injury irritated his eye and resulted in ulcer. Seven days after the accident the plaintiff was treated by a doctor, who gave the plaintiff some lotion to use. He visited the doctor three times. Then gonorrhea ophthalmia showed up, which was on the thirteenth day after the accident. As a result of the infection the plaintiff lost one

eye and suffered a partial loss of use in the other eye. Compensation was allowed. The Commission said that the disease was "natural" because one infection opened the way for other infections. There was more trouble with the word "unavoidably." The Commission quotes from the opinions rendered in other jurisdictions to illustrate that "unavoidably" does not mean "absolutely inescapable," but that "a thing is generally considered unavoidable when common prudence and foresight cannot prevent it." And since no evidence was presented that the plaintiff had been careless, and since the plaintiff had no reason to suspect a possible infection of this nature, the disease was found to have resulted unavoidably from the accident. This liberal construction tends to effectuate the general purpose of the Workmen's Compensation Act. 8 N. C. Law Rev. 421.

As to falls due to dizziness, vertigo, epilepsy and like causes as compensable accidents, see 26 N. C. Law Rev. 320.

Ordinarily, heart disease is not an injury and death thereform is not ordinarily compensable. West v. North Carolina Dept. of Conservation and Development, 229 N. C. 232, 49 S. E. (2d) 398 (1948).

Dilatation of the Heart Due to Unusual Exertion.—A policeman fifty-six years of age, who was in good health and without any physical defect or disease, arrested a young man who, because of intoxication, violently and viciously resisted, and after the officer subdued him and transported him to the jail, the officer and another had to carry the prisoner up three flights of stairs because the elevator was out of order. The officer collapsed with acute dilatation of the heart due to the unusual exertion. This injury to the heart muscle chronic and progressive and the policeman suffered a fatal heart attack some ten months thereafter. It was held that the evidence warranted the conclusion that the injury to the heart resulted not from inherent weakness or disease but from an unusual and unexpected happening, and that therefore death resulted from an accident within the meaning of this section. Gabriel v. Newton, 227 N. C. 314, 42 S. E. (2d) 96 (1947).

Employee Contracting Pneumonia. — Where an employee got wet in washing certain machines, although furnished with special clothes, and while removing ashes, was in the sunshine and open air, and the sudden change in temperature caused him to contract pneumonia, from which he died, it was held that the death was not the result of an accidental injury. Slade v. Willis Hosiery Mills, 209 N. C. 823, 184 S. E. 844 (1936).

V. DISABILITY.

How Disability Measured.—Disability, under the Workmen's Compensation Act, is measured by the capacity or incapacity of the employee to earn the wages he was receiving at the time of the injury, by the same or any other employment. And the fact that the same wages are paid by the employer because of long service, does not alter the rule. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

There is no "disability" if the employee is receiving the same wages in the same or any other employment. That "in the same" employment he is not required to perform all the physical work theretofore required of him can make no difference. Even so, if this be not "the same employment" then it clearly comes within the term "other employment." To remove the employment from one classification necessarily shifts it to the other. Furthermore, there is no language used in this section or in any other part of the statute which even suggests that "other employment" must be with a different employer. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

VI. COMPENSATION.

Payment of medical or hospital expenses constitutes no part of compensation to an employee or his dependents under the provisions of our Workmen's Compensation Act. Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948).

§ 97-3. Presumption that all employers and employees have come under provisions of chapter.—From and after July 1, 1929, every employer and employee, except as herein stated, shall be presumed to have accepted the provisions of this article respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner herein provided. (1929, c. 120, s. 4.)

Presumption of Acceptance of Act.—In C. 426, 160 S. E. 479 (1931), it is said: Pilley v. Greenville Cotton Mills, 201 N. "Under the Workmen's Compensation

Act every employer and employee, except as therein stated, is presumed to have accepted the provisions of the Act and to pay and accept compensation for personal injury or death as therein set forth. The plaintiff, not being in the excepted class, is bound by the presumption." Miller v. Roberts, 212 N. C. 126, 131, 193 S. E. 286 (1937). See Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809 (1937).

An allegation that the employee had not accepted the provisions of the Act is immaterial for the reason that this section provides in substance that every employer and employee coming within the purview of the Act is presumed to have accepted the provisions thereof. Hanks v. Southern Public Utilities Co., 204 N. C. 155, 167 S. E.

560 (1933)

When Presumption Not Operative .-Where the evidence does not show that the employer has regularly in service the requisite number of employees in the same business within this State, the presumption under this section is not operative. Thomp-Dependents v. Johnson Funeral Home, 205 N. C. 801, 172 S. E. 500 (1934).

Rebuttal of Presumption.—Notwithstanding the presumption contained in this section, there are provisions in the Act whereby employers, as well as employees, may except themselves from the operation thereof, and the presumption of acceptance may be rebutted by proof of nonacceptance. Calahan v. Roberts, 208 N. C. 768, 182 S. E. 657 (1935).

An infant employee is bound by the terms of the North Carolina Workmen's Compensation Act regardless of his age. Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429 (1941).

Ordinarily, the parties may not by agreement or conduct extend the provisions of this chapter, but continued and definite recognition of the relationship of employer and employee, based on knowledge of the work performed, and acceptance of benefits of that status, may work an estoppel after loss. Pearson v. Pearson, 222 N. C. 69, 21 S. E. (2d) 879 (1942).

Applied in McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. F. 509 (1934); Arp v. Wood & Co., 207 N. C. 41, 175 S. E. 719 (1934); Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809 (1937); Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623 (1938); Ward v. Bowles, 228 N. C. 273, 45 S. E. (2d) 354 (1947).

Stated in Worley v. Pipes, 229 N. C. 465,

50 S. E. (2d) 504 (1948).

Cited in Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536 (1938); Odum v. National Oil Co., 213 N. C. 478, 196 S. E. 823 (1938); McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219 (1940); Cooke v. Gillis, 218 N. C. 726, 12 S. E. (2d) 250 (1940).

§ 97-4. Notice of nonacceptance and waiver of exemption.—Either an employer or an employee, who has exempted himself by proper notice from the operation of this article, may at any time waive such exemption, and thereby

accept the provisions of this article by giving notice as herein provided.

The notice of nonacceptance of the provisions of this article shall be given thirty days prior to any accident resulting in injury or death: Provided, that if any such accident occurred less than thirty days after the date of employment, notice of such exemption or acceptance given at the time of employment shall be sufficient notice thereof. An employee may waive notice of nonacceptance by giving five days' notice in the manner provided for nonacceptance. shall be in writing or print, in substantially the form prescribed by the Industrial Commission, and shall be given by the employer by posting the same in a conspicuous place in the shop, plant, office, room, or place where the employee is employed, or by serving it personally upon him; and shall be given by the employee by sending the same in registered letter, addressed to the employer at his last known residence or place of business, or by giving it personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State. A copy of the notice in prescribed form shall also be filed with the Industrial Commission.

In any suit by an employer or an employee who has exempted himself by proper notice from the application of this article, a copy of such notice duly certified by the Industrial Commission shall be admissible in evidence as proof of such exemption. (1929, c. 120, s. 5; 1945, c. 766.)

Editor's Note. - The 1945 amendment of exemption heretofore referred to" forstruck out the words "and notice of waiver merly appearing after the word "article" near the beginning of the second paragraph. It also inserted the second sentence of the paragraph relating to waiver of notice of nonacceptance.

Where the parties are presumed to have accepted the provisions of the Compensation Act, under the facts alleged, the further allegation that defendants were not operating under the Act involved both law and fact and was sufficient to admit proof of nonacceptance of the provisions of the Act; and it was error for the court to sustain defendants' demurrer on the ground

that the Industrial Commission had exclusive jurisdiction, it being a question of law for the court, when the plaintiff introduced his evidence, to determine whether defendant employer was not operating under the Act. Cooke v. Gillis, 218 N. C. 726, 12 S. E. (2d) 250 (1940).

Applied in Miller v. Roberts, 212 N. C.

126, 193 S. E. 286 (1937).

Cited in Calahan v. Roberts, 208 N. C. 768, 182 S. E. 657 (1935); Ward v. Bowles, 228 N. C. 273, 45 S. E. (2d) 354 (1947).

§ 97-5. Presumption as to contract of service.—Every contract of service between any employer and employee covered by this article, written or implied, now in operation or made or implied prior to July 1, 1929, shall, after that date, be presumed to continue, subject to the provisions of this article; and every such contract made subsequent to that date shall be presumed to have been made subject to the provisions of this article, unless either party shall give notice, as provided in § 97-4, to the other party to such contract that the provisions of this article other than §§ 97-14, 97-15, 97-16, and 97-92 are not intended to apply.

A like presumption shall exist equally in the case of all minors, unless notice of the same character be given by or to the parent or guardian of the minor. (1929, c. 120, s. 6.)

Applied in Miller v. Roberts, 212 N. C. 126, 193 S. E. 286 (1937).

97-6. No special contract can relieve an employer of obligations. --No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer, in whole or in part, of any obligation created by this article, except as herein otherwise expressly provided. (1929, c. 120, s. 7.)

Applied in Brown v. Bottoms Truck Stated in Worley v. Pipes, 229 N. C. 465, Lines, 227 N. C. 299, 42 S. E. (2d) 71 50 S. E. (2d) 504 (1948). (1947).

§ 97-7. State or subdivision and employees thereof. — Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such corporation or subdivision, shall have the right to reject the provisions of this article relative to payment and acceptance of compensation, and the provisions of §§ 97-4, 97-5, 97-14, 97-15, and 97-16 shall not apply to them: Provided, that all counties are hereby authorized to self-insure or purchase insurance to secure its liability under this article and to include thereunder the liability of such subordinate governmental agencies as the county board of health, the school board, and other political and quasi-political subdivisions supported in whole or in part by the county, and to appropriate an amount sufficient for this purpose and levy a special tax if a special tax is necessary to pay the costs of same. (1929, c. 120, s. 8; 1931, c. 274, s. 1; 1945, c. 766.)

Editor's Note. - The 1931 amendment added the three provisos to this section, which were rewritten by the 1945 amendment to appear as the present proviso.

Applied in Perdue v. State Board of

Equalization, 205 N. C. 730, 172 S. E. 396 (1934); Barnhardt v. Concord, 213 N. C. 364, 196 S. E. 310 (1938); Rape v. Huntersville, 214 N. C. 505, 199 S. E. 736 (1938).

§ 97-8. Prior injuries and deaths unaffected.—The provisions of this

article shall not apply to injuries or deaths, nor to accidents which occurred prior to July 1, 1929. (1929, c. 120, s. 9.)

Applied in Hafleigh & Co. v. Crossingham, 206 N. C. 333, 173 S. E. 619 (1934).

§ 97-9. Employer to secure payment of compensation. — Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified. (1929, c. 120, s. 10.)

Cited in Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (dis. op.) (1943).

8 97-10. Other rights and remedies against employer excluded; employer or insurer may sue third party tort-feasor; attorney's fees; subrogation; amount of compensation as evidence; minors illegally employed. — The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this article, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death: Provided, however, that in any case where such employee, his personal representative, or other person may have a right to recover damages for such injury, loss of service, or death from any person other than the employer, compensation shall be paid in accordance with the provisions of this chapter: Provided, further, that after the Industrial Commission shall have issued an award, or the employer or his carrier has admitted liability in writing and filed same with the Industrial Commission, the employer or his carrier shall have the exclusive right to commence an action in his own name and/or in the name of the injured employee or his personal representative for damages on account of such injury or death, and any amount recovered by the employer shall be applied as follows: First to the payment of actual court costs, then to the payment of attorneys' fees when approved by the Industrial Commission; the remainder or so much thereof as is necessary shall be paid to the employer to reimburse him for any amount paid and/or to be paid by him under the award of the Industrial Commission; if there then remain any excess, the amount thereof shall be paid to the injured employee or other person entitled thereto: Provided further that the amount of attorney's fees paid out in the distribution of the above recovery shall be a charge against the amount due and payable to the employer and employee in proportion to the amount each shall receive out of the recovery. however, the employer does not commence such action within six months from the date of such injury or death, the employee, or his personal representative, shall thereafter have the right to bring the action in his own name, and any amount recovered shall be paid in the same manner as if the employer had brought the action.

The amount of compensation paid by the employer, or the amount of compensation to which the injured employee or his dependents are entitled, shall not

be admissible as evidence in any action against a third party.

When any employer is insured against liability for compensation with any insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable or shall have assumed the liability of the employer therefor, it shall be subrogated to all rights and duties of the employer, and may enforce any such rights in the name of the injured employee or his personal representative; but nothing herein shall be construed as conferring upon

the insurance carrier any other or further rights than those existing in the employer at the time of the injury to or death of the employee, anything in the policy of insurance to the contrary notwithstanding.

In all cases where an employer and employee have accepted the Workmen's Compensation Act, any injury to a minor while employed contrary to the laws of this State shall be compensable under this article the same and to the same extent as if said minor were an adult. (1929, c. 120, s. 11; 1933, c. 449, s. 1: 1943, c. 622.)

Editor's Note.—The 1933 amendment rewrote this section.

The 1943 amendment added the third proviso to the first sentence. It also struck out in the second proviso thereto the words "the employer may" and inserted in place thereof the words "or the employer or his carrier has admitted liability in writing and filed same with the Industrial Commission, the employer or his carrier shall have the exclusive right to."

For comment on the 1943 amendment, see 21 N. C. Law Rev. 382.

Purpose of Section.-Manifestly the statute was designed primarily to secure prompt and reasonable compensation for an employee, and at the same time to permit an employer or his insurance carrier, who has made a settlement with the employee, to recover the amount so paid from a third party causing the injury to such employee. The statute was not designed as a city of refuge for a negligent third party. Brown v. Southern R. Co., 204 N. C. 668, 169 S. E. 419 (1933).

Remedy against Employer Is Exclusive. -Where the allegations and evidence in an action for damages at common law show that the injury in suit was caused by an accident arising out of and in the course of plaintiff's employment, defendant's motion of nonsuit will be granted, as plaintiff's remedy under this Act is exclusive of all other remedies. McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509 (1934). See Miller v. Roberts, 212 N. C. 126, 193 S. E. 286 (1937); Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809 (1937); Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623 (1938); Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239 (1942).

Where both the plaintiff and the defendant are presumed to have accepted the provisions of the Workmen's Compensation Act they are bound thereby, and the rights and remedies therein granted are exclusive, and the contention that since the Compensation Act does not provide for the award of punitive damages, plaintiff has not waived his right to trial by jury for the ascertainment thereof, is untenable. Mc-Cune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219 (1940).

Where Employee's Claim for Compensa-

tion Is Denied.—Plaintiff and his employer were bound by the provisions of the Workmen's Compensation Act. Plaintiff's injury occurred while he was allowed by his employer to use certain machinery for his own personal ends. Compensation was denied since the accident did not arise out of and in the course of the employment. Thereafter plaintiff sued, alleging negligence on the part of the employer. But it was held that, conceding that the evidence established negligence of defendant employer, the Compensation Act barred all other rights and remedies of employee except those provided in the Act. Francis v. Carolina Wood Turning Co., 208 N. C. 517, 181 S. E. 628 (1935).

Surrender of Right of Action Is Not Absolute.—Expressions in this section regarding the surrender of the right to maintain common-law or statutory actions against the employer are not absolute-not words of universal import, making no contact with time, place or circumstance. They must be construed within the framework of the Act, and as qualified by its subject and purposes. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

Suits against Third Persons Not Barred. -Under the 1933 amendment to this section an injured employee may pursue his remedies against the employer under the Workmen's Compensation Act and also maintain action against the third person whose tortious act caused his injury. Whitehead v. Branch, 220 N. C. 507, 17 S. E. (2d) 637 (1941).

It was said in Thompson v. Virginia, etc., R. Co., 216 N. C. 554, 6 S. E. (2d) 38 (1939), referring to this section, that the rights and remedies granted by the Act to an employee to secure compensation for an injury by accident, as against his employer, were exclusive, but that the provision making the remedy exclusive did not appear in the clause relating to suits against third persons. This statement of the law was cited with approval in Mack v. Marshall Field & Co., 217 N. C. 55, 6 S. E. (2d) 889

(1940); Whitehead v. Branch, 220 N. C.

507, 17 S. E. (2d) 637 (1941).

The remedies given an employee under the Workmen's Compensation Act are exclusive as against the employer only, and the Act does not preclude an employee from waiving his claim against his employer and pursuing his remedy against a third-party tort-feasor by common-law action for negligence, although his rights against such third party after a claim for compensation is filed are limited. Ward v. Bowles, 228 N. C. 273, 45 S. E. (2d) 354 (1947).

Employee of Subcontractor May Maintain Action against Main Contractor.—An employee of a subcontractor is not precluded by the Workmen's Compensation Act from maintaining an action at common law against the main contractor for injuries resulting from alleged negligence on the part of the main contractor, since the action is not against plaintiff's employer but against a third person. Cathey v. Southeastern Const. Co., 218 N. C. 525, 11 S. E. (2d) 571 (1940).

Employer Is Not Joint Tort-Feasor.—Because of the provisions of this section, the employer is not a joint tort-feasor, and an acceptance of an award against said employer for compensation would not discharge a third person whose negligence had contributed to the injury or death of the employee. Betts v. Southern Ry. Co., 71 F. (2d) 787 (1934).

Employee Filing Counterclaim in Action by Third Person.—After filing proceedings for compensation claimant filed a counterclaim in a suit at law instituted against him by a third person, which suit involved the same accident resulting in the injuries for which he sought compensation. Under this section as it stood before the 1933 amendment, claimant was not barred by filing the counterclaim from thereafter prosecuting his claim before the Industrial Commission, since he recovered no judgment, and the intent of the section was that an injured employee should be compensated either by an award or by the "procurement of a judgment in an action at law." Rowe v. Rowe-Coward Co., 208 N. C. 484, 181 S. E. 254 (1935).

Action for Wrongful Death — Against Employer.—In Bright v. N. B., etc., Motor Lines, 212 N. C. 384, 193 S. E. 391 (1937), it was held that an award by the Industrial Commission to the widow of an employee excludes all other rights and remedies, and the administrator of the employee may not maintain an action against the employer for wrongful death, and the fact that the injury resulted from negligence in the vio-

lation by the employer of a criminal statute does not alter this result.

Same — Against Third Person. — The right of the administrator to maintain an action for death by wrongful act against a third-person tort-feasor is not defeated, in view of this section, as a result of the widow's acceptance of compensation. Betts v. Southern Ry. Co., 71 F. (2d) 787 (1934).

Deceased was an employee of a subcontractor in the construction of a building, and was killed while performing his duties in the structural steel work when a steel beam came into contact with an uninsulated, highly charged electric wire. This action was instituted by the administrator of the employee against the owner, the principal contractor and others, upon allegations that defendants were negligent in permitting the uninsulated, highly charged wire to remain where it would likely cause injury to the structural steel workers and in failing to give proper warning of the danger. The employer of plaintiff's intestate was not a party to the action. Defendants demurred on the ground that upon the face of the complaint it appeared that the superior court was without jurisdiction and that the Industrial Commission had exclusive original jurisdiction. Under § 28-173 only the personal representative may maintain an action for wrongful death, and the complaint alleged a cause of action therefor against defendants, and there demurrer was properly overruled, defendants having no interest in the disposition of any recovery in accordance with the provisions of this section, Mack v. Marshall Field & Co., 217 N. C. 55, 6 S. E. (2d) 889 (1940).

In an action instituted by an administratrix to recover for wrongful death of intestate, defendant's answer alleged facts upon which it contended that the cause alleged was within the exclusive jurisdiction of the Industrial Commission, that an award had been made under the Compensation Act and any right of action against defendant assigned, and that plaintiff did not have the right, or sole right, to maintain the action. Plaintiff moved to strike such allegations from the complaint. Upon the record as constituted plaintiff's motion to strike should have been granted. Sayles v. Loftis, 217 N. C. 674, 9 S. E. (2d) 393 (1940).

Right under Death by Wrongful Act Statute of Another State Not Affected.— The acceptance of compensation under this Act cannot affect the right to pursue a remedy against a third person under the wrongful death statute of another state, unless there is something in the law of the

latter state which so provides. Betts v. Southern Ry. Co., 71 F. (2d) 787 (1934).

Assignment of Such Claim Is Governed by Law of This State.—The assignment of the right of recovery against a third person under the wrongful death statute of one state as the result of acceptance by the beneficiary of compensation from the employer under the Compensation Act of this State, in the absence of any provision to the contrary in the law of the state of the injury, is governed by the law of this State. Betts v. Southern Ry. Co., 71 F. (2d) 787 (1934).

This section assigns the injured person's right of action against a tort-feasor to the employer or to the employer's insurer, and enables the assignee to maintain the action which the employee could have maintained had no such assignment been made. Phifer v. Berry, 202 N. C. 388, 163 S. E. 119 (1932).

Rights and Liabilities of Third Person Not Affected.—The insurance carrier who has paid compensation to an injured employee for which the employer was liable under this chapter may maintain an action against a third person upon allegations that the negligence of such third person caused the injury, but the rights and liabilities of such third person are in nowise affected by the chapter. Hinson v. Davis, 220 N. C. 380, 17 S. E. (2d) 348 (1941).

Action by Insurer to Be in Name of Employee or Personal Representative.— The reference in this section to the right of subrogation accruing to the insurance carrier upon payment of the compensation awarded is coupled with the designation that the enforcement of such right be in the name of the injured employee or his personal representative. Whitehead v. Branch, 220 N. C. 507, 17 S. E. (2d) 637 (1941).

Necessity for New Action against Third Person.—Whether the employer or insurance carrier who has paid compensation may proceed in the action which has been instituted against a third person by an injured employee or his personal representative, or must institute a new and independent action, is a question of procedure, and under the law of this State it is proper to proceed in the action which has been instituted. Betts v. Southern Ry. Co., 71 F. (2d) 787 (1934).

Action by Insurance Carrier Instituted after Action by Employee.—Where it appears that an injured employee's action against the third-person tort-feasor was instituted prior to the institution of an action by the compensation insurance carrier against the tort-feasor, defendant's plea in

abatement in the employee's action on the ground of the pendency of a prior action cannot be sustained. Thompson v. Virginia, etc., R. Co., 216 N. C. 554, 6 S. E. (2d) 38 (1939). For comment on this case, see 18 N. C. Law Rev. 375.

Employer Cannot Be Made Party Defendant.—The remedy under the Workmen's Compensation Act is exclusive and under the express terms of this section an employer is relieved of all further liability for injury to or death of an employee, and where the administrator of a deceased employee brings action against third persons for the employee's wrongful death, the motion of the defendants that the deceased's employer be made a party as a joint tort-feasor with them should be denied. Brown v. Southern R. Co., 202 N. C. 256, 162 S. E. 613 (1932).

Action by Employee Where Employer Has Not Commenced Action in Six Months.—The meaning of this section is both clear and logical, namely, that if after the expiration of six months from the date of the injury or death, the employer has not commenced an action, the employee, or his personal representative, shall thereafter have the right to bring an action in his own name, and that any amount recovered shall be paid in the same manner as if the employer had brought the action. Ikerd v. North Carolina R. Co., 209 N. C. 270, 183 S. E. 402 (1936).

Joinder of Insurance Carrier Properly Denied. - More than six months after the injury complained of, the original defendants filed a petition and moved that the employer's insurance carrier also be made a party defendant. The motion was denied. and defendants appealed. The motion for joinder of the insurance carrier was properly denied under the provisions of this section, the statute giving the right to an 'employee to maintain an action against a third-person tort-feasor if the employer fails to institute such action within six months from the date of the injury. Peterson v. McManus, 208 N. C. 802, 182 S. E. 483 (1935)

Acts of Employer as Affecting Rights of Insurer Subrogee.—A collision between a bus and a car caused the death of the driver of the car and injury to the driver of the bus. The insurance carrier paid compensation to the driver of the bus for which the bus driver's employer was liable under the Workmen's Compensation Act, and instituted an action in the name of the employee against the administrator of the estate of the driver of the car. Thereafter the employer paid the administrator a certain sum in full settlement for the death of

the driver of the car. The administrator set up this accord as a bar in the action instituted by the insurance carrier in the name of the employee. It was held that the insurance carrier had been subrogated to the right to maintain the action, and that the employer could not affect that right by any act to which the insurance carrier was not a party, and that an accord to which neither the employee nor the insurance carrier was a party could not bar their right of action. Hinson v. Davis, 220 N. C. 380, 17 S. E. (2d) 348 (1941).

Setting Up Employer's Negligence.—In an action begun under this section a third-person tort-feasor may set up the employer's negligence in bar of recovery, since the employer will not be allowed to profit by his own wrong in causing the employee's death. Brown v. Southern R. Co., 204 N. C. 668, 169 S. E. 419 (1933).

Illegal Agreement between Employee's Dependents and Employer.—In an action by the administrator of a deceased employee against the third-party tort-feasor, allegations in defendant's answer of an illegal agreement between the dependents and the employer for the distribution of the fund, are properly stricken on motion, since the administrator is an official of the court under duty to make disbursement of any recovery in conformity with statute, and could not be bound by the terms of the agreement alleged. Penny v. Stone, 228 N. C. 295, 45 S. E. (2d) 362 (1947).

Allegations Failing to Show Contract by Employer and Carrier Not to Sue. - An action was instituted by the administrator of a deceased employee against a thirdparty tort-feasor. Compensation had been paid for the employee's death under the Workmen's Compensation Act. Defendant alleged in its answer that in the collision causing the death of plaintiff's intestate, other persons were killed or injured, that the other actions growing out of the collision were compromised, and that in the settlement defendant made a substantial contribution upon the assurance of the attorneys for the employer and insurance carrier that they would recommend that this action not be instituted. It was held that the allegations failed to show a contract by the employer or the insurance carrier not to sue, or that the attorneys did not make the promised recommendation in good faith; and the allegations were properly stricken upon motion in the administrator's action. Penny v. Stone, 228 N. C. 295, 45 S. E. (2d) 362 (1947).

Amount and Distribution of Recovery in Action by Insurance Carrier.—When an

action is maintained by the insurance carrier in the name of the injured employee against the third-person tort-feasor causing the injury, the tort-feasor is liable for the amount ascertained by the jury as sufficient to compensate the employee for the injuries sustained, which the statute prescribes shall be first applied to the actual court costs, then to the payment of attorneys' fees when approved by the Commission, then to the reimbursement of the insurance carrier for money paid by it under the award, and any remaining excess to the injured employee, and an instruction on the issue of damages that defendant would be liable for such sum as would reimburse the insurance carrier and would fairly compensate the injured employee is error. Rogers v. Southeastern Construction Co., 214 N. C. 269, 199 S. E. 41 (1938).

Evidence as to Amount of Compensation Prohibited.—In an action by the administrator of an employee against the third-party tort-feasor, evidence concerning amount of compensation paid by the employer, or the amount thereof to which dependents are entitled, is prohibited. Penny v. Stone, 228 N. C. 295, 45 S. E. (2d) 362 (1947).

Double Recovery.—See article entitled, "Settlement with a Third Party," 8 N. C. Law Rev. 424.

Employer Is Not Relieved of Liability by Insurer's Insolvency after Recovery against Third Person.—An administratrix was only a nominal party to a suit against a third-person tort-feasor and had no control over the recovery and could not safeguard it for the purpose of paying the award, and the employer, who selected the insurance carrier for his own protection, is not relieved of his primary obligation to the dependents of the employee by reason of the insurer's recovery from the third person and default in payment because of insolvency, nor does the fact that the employer had no notice of the suit by the insurer against the third person alter this result. Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438 (1936).

Surplusage in Former Wording of Section.—The words "and the employer," appearing in the last sentence of the first paragraph as rewritten by the 1933 amendment, had no proper grammatical place in the sentence, and rendered it ambiguous and doubtful. So it was held, in construing the sentence, that these words were surplusage, and as such should be disregarded. Ikerd v. North Carolina R. Co., 209 N. C. 270, 183 S. E. 402 (1936).

Applied in Lincoln v. Atlantic Coast

Line R. Co., 207 N. C. 787, 178 S. E. 601 (1935); Jones v. Raney Chevrolet Co., 217 N. C. 693, 9 S. E. (2d) 395 (1940).

Quoted in Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403

(1937).

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Cited in Francis v. Carolina Wood Turning Co., 208 N. C. 517, 181 S. E. 628 (1935); Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536 (1938); Cooke v. Gillis, 218 N. C. 726, 12 S. E. (2d) 250 (1940); Lee v. Carolina Upholstery Co., 227 N. C. 88, 40 S. E. (2d) 688 (1946).

- § 97-11. Employer not relieved of statutory duty. Nothing in this article shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty. (1929, c. 120, s. 12.)
- § 97-12. Intoxication or willful neglect of employee; willful disobedience of statutory duty, safety regulation or rule.—No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. When the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation shall be increased ten per cent. When the injury or death is caused by the willful failure of the employee to use a safety appliance or perform a statutory duty or by the willful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury, compensation shall be reduced ten per cent. The burden of proof shall be upon him who claims an exemption or forfeiture under this section. (1929, c. 120, s. 13.)

The negligence of the employee does not disbar him from compensation, except only in cases where the injury is occasioned by his intoxication or willful intention to injure himself or another. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834 (1943).

Failure to Use Safety Appliances or Observe Rules.— This section does not deny compensation when it appears that an injury was caused by the willful failure of an employee to use a safety appliance, or by the willful breach of a rule or regulation adopted by the employer and approved by the Industrial Commission, but only subjects the injured employee to the penalty of a reduction in the compensation to be awarded. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834

(1943).

Sufficiency of Evidence. — In Brooks v. Carolina Rim, etc., Co., 213 N. C. 518, 196 S. E. 835 (1938), it was held that the evidence was sufficient to support finding of Industrial Commission that the accident causing injury was not the result of the employee's intoxication, although defendants introduced evidence in conflict therewith.

Where it is shown that the employee's death resulted from a bullet wound, such showing raises a prima facie case only of death by accident, placing upon the employer the burden of going forward with evidence to show that the employee killed himself within the exemption or forfeiture under this section. McGill v. Lumberton, 215 N. C. 752, 3 S. E. (2d) 324 (1939).

§ 97-13. Exceptions from provisions of article.—(a) Employees of Certain Railroads.—This article shall not apply to railroads or railroad employees nor in any way repeal, amend, alter or affect article eight (8) of chapter sixty (60), or any section thereof, relating to the liability of railroads for injuries to employees; nor, upon the trial of any action in tort for injuries not coming under the provisions of this article, shail any provision herein be placed in evidence or be permitted to be argued to the jury: Provided, however, that the foregoing exemption to railroads and railroad employees shall not apply to electric street railroads or employees thereof; and this article shall apply to electric street railroads and employees thereof, and to this extent the provisions of article eight (8) of chapter sixty (60) are hereby amended.

(b) Casual Employment, Domestic Servants, Farm Laborers, Federal Govern-

(b) Casual Employment, Domestic Servants, Farm Laborers, Federal Government, Employer of Less than Five Employees.—This article shall not apply to casual employees, farm laborers, federal government employees in North Caro-

lina, and domestic servants, nor to employees of such persons, nor to any person, firm or private corporation that has regularly in service less than five employees in the same business within this State, except that any employer, without regard to number of employees, including an employer of domestic servants, farm laborers, or one who previously had exempted himself, who has purchased workmen's compensation insurance to cover his compensation liability shall be conclusively presumed during life of the policy to have accepted the provisions of this article from the effective date of said policy, and his employees shall be so bound unless waived as provided in this article.

- (c) Prisoners.—'This article shall not apply to prisoners being worked by the State or any subdivision thereof, except to the following extent: Whenever any prisoner assigned to the State Highway and Public Works Commission shall suffer accidental injury arising out of and in the course of the employment to which he had been assigned, if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this article, then such discharged prisoner may have the benefit of this article by applying to the Industrial Commission as any other employee; provided, such application is made within twelve months from the date of discharge; and provided, further, that the maximum compensation to any prisoner shall not exceed fifteen dollars per month and the period of compensation shall relate to the date of his discharge rather than to the date of the accident, and prisoners who have been discharged prior to March 15, 1941, who are covered by the terms of the subsection may have twelve months from March 15, 1941, in which to apply for its benefits, but as to such prisoners their compensation shall be computed only from the date of their application and shall not be cumulative for any prior period; and no award shall be made for facial disfigurement, and no award other than burial expenses shall be made for any prisoner whose accident results in death; and no award shall be made for any injury where there is no apparent or outward physical evidence of such injury, unless it is clearly established by medical opinion and supporting testimony that the matter complained of results solely from the accident arising out of and in the course of employment. If any person who has been awarded compensation under the provisions of this section shall be recommitted to prison upon conviction for an offense committed subsequent to the award, such compensation shall immediately cease and determine. Any awards made under the terms of this subsection shall be paid by the State Highway and Public Works Commission from the funds available for the operation of the Prison Department.
- (d) Sellers of Agricultural Products.—This article shall not apply to persons, firms or corporations engaged in selling agricultural products for the producers thereof on commission or for other compensation, paid by the producers, provided the product is prepared for sale by the producer. (1929, c. 120, s. 14; 1933, c. 401; 1935, c. 150; 1941, c. 295; 1943, c. 543; 1945, c. 766.)

Local Modification.—Mecklenburg: 1933, c. 401.

Editor's Note.—The 1933 amendment added the proviso to subsection (a). And the 1935 amendment changed subsection (b).

The 1941 amendment rewrote subsection (c). For comment on this amendment, see 19 N. C. Law Rev. 545.

The 1943 amendment substituted "article eight (8)" for "article seven (7)" at two places in subsection (a). And the 1945 amendment rewrote subsection (b).

Employment of More than Five Must Affirmatively Appear.—It must appear af-

firmatively by evidence or by admission of record that a defendant sought to be held liable under this chapter had in his employ five or more employees in order to sustain the jurisdiction of the Commission. Chadwick v. North Carolina Department of Conservation, etc., 219 N. C. 766, 14 S. E. (2d) 842 (1941).

A demurrer to an action for death of an employee, on the ground that the action is cognizable only by the Industrial Commission, is properly overruled when it does not appear on the face of the complaint that the defendant employed more than five men in this State. Hanks v. Southern Pub-

lic Utilities Co., 204 N. C. 155, 167 S. E. 560 (1933). See Allen v. American Cotton Mills, 206 N. C. 704, 175 S. E. 98 (1934).

Same—Reversal of Commission's Award.
—When it is not made to affirmatively appear that the defendant sought to be held liable under this chapter had in his employ five or more employees, the Commission's award of compensation against him must be reversed. Chadwick v. North Carolina Department of Conservation, etc., 219 N. C. 766, 14 S. E. (2d) 842 (1941).

Where the findings of facts of the Industrial Commission that the deceased was an employee of the defendant and that the defendant employed more than five workers, are not supported by any evidence in the hearing before it, the findings are jurisdictional, and upon appeal to the superior court the award should be set aside and vacated. Poole v. Sigmon, 202 N.

C. 172, 162 S. E. 198 (1932).

Evidence Tending to Show Less than Five Regular Employees.—Where, in a hearing before the Industrial Commission, the employer testifies that he employed three men other than himself, and another witness testifies that at the time of the injury in suit there were two men working besides the employer and that the other employees were on vacation, the evidence is insufficient to support the finding that the parties were bound by the Act, since the evidence tends to show that the employer regularly employed less than five

employees. Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 801, 172 S. E. 500 (1934).

Prima Facie Evidence of Coverage by Act.—This section merely facilitates proof that the employer and its employees are subject to the terms of the Workmen's Compensation Act. Proof that the employer obtained insurance and a claim was filed is, under this section, prima facie evidence that the employer and the employee have elected to be bound by the Act. Gassaway v. Gassaway, 220 N. C. 694, 18 S. E. (2d) 120 (1942), decided prior to the 1945 amendment.

The former provisions of this section that proof that the employer obtained insurance and filed claim should be prima facie evidence that the employer and employee have elected to be bound by the Act did not have the effect of raising a presumption that an executive officer injured in the course of his duties was at the time engaged in the duties of an employee rather than those of an executive. Gassaway v. Gassaway, 220 N. C. 694, 18 S. E. (2d) 120 (1942).

Applied in Aycock v. Cooper, 202 N. C. 500, 163 S. E. 569 (1932); Young v. Mayland Mica Co., 212 N. C. 243, 193 S. E. 285 (1937); Rape v. Huntersville, 214 N. C. 505, 199 S. E. 736 (1938).

Cited in Borders v. Cline, 212 N. C. 472, 193 S. E. 826 (1937).

§ 97-14. Employers not bound by article may not use certain defenses in damage suit.—An employer who elects not to operate under this article shall not, in any suit at law instituted by an employee subject to this article to recover damages for personal injury or death by accident, be permitted to defend any such suit at law upon any or all of the following grounds:

(a) That the employee was negligent.

(b) That the injury was caused by the negligence of a fellow employee.

(c) That the employee has assumed the risk of the injury. (1929, c. 120, s. 15.)

Employer Is Not an Insurer.—This section although abolishing an employer's most cherished defenses, does not make him an insurer, nor does it relieve the employee of establishing a breach of duty. It is elementary, however, that this section leaves the employer in a completely exposed position. Great Atlantic, etc., Tea Co. v. Robards, 161 F. (2d) 929 (1947).

This section cannot be held to have abolished the simple tool doctrine as a ground of defense. Newbern v. Great Atlantic, etc., Tea Co., 68 F. (2d) 523, 91 A.

L. R. 781 (1934).

Contributory Negligence.—Where it is admitted that defendant employer had a sufficient number of employees to bring him under this chapter, but that he had elected not to do so, the defense of contributory negligence is properly excluded. Lee v. Roberson, 220 N. C. 61, 16 S. E. (2d) 459 (1941).

Cited in Calahan v. Roberts, 208 N. C. 768, 182 S. E. 657 (1935); Dark v. Johnson, 225 N. C. 651, 36 S. E. (2d) 237 (1945).

§ 97-15. Electing employer may use such defenses against nonelecting employee.—An employee who elects not to operate under this article shall, in any action to recover damages for personal injury or death brought against an employer accepting the compensation provisions of this article, proceed at common law, and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant, and assumption of risk, as such defenses exist at common law. (1929, c. 120, s. 16.)

§ 97-16. Defenses denied to nonelecting employer as against nonelecting employee.—When both the employer and employee elect not to operate under this article, the liability of the employer shall be the same as though he alone rejected the terms of this article, and in any suit brought against him by such employee the employer shall not be permitted to avail himself of any of the common-law defenses cited in § 97-14. Provided, however, that in Ashe, Avery, Bladen, Carteret, Caswell, Cherokee, Gates, Hyde, Macon, Pender, Perquimans, Union, Watauga and Wilkes counties any sheriff may exempt himself and any and all deputies appointed by him from the provisions of this article by notice in writing to the Industrial Commission, such notice to be made on forms prescribed by the Industrial Commission. (1929, c. 120, s. 17; 1931, c. 274, s. 2; 1939, c. 277, s. 2; 1943, c. 543.)

Editor's Note.—The 1931 amendment added a proviso permitting sheriffs to exempt themselves and their deputies from the Act. The 1939 amendment deleted the said proviso, and the 1943 amendment added the present proviso.

The former provision permitting a sheriff to exempt himself from the operation of the Act by giving the notice prescribed, did not have the effect of bringing

deputy sheriffs within the intent and meaning of the Act, nor did the fact that a sheriff purchased insurance to cover his compensation liability have the effect of enlarging or extending the language of the Act. Borders v. Cline, 212 N. C. 472, 193 S. E. 826 (1937).

Cited in Calahan v. Roberts, 208 N. C. 768, 182 S. E. 657 (1935).

§ 97-17. Settlements allowed in accordance with article.—Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this article. A copy of such settlement agreement shall be filed by employer with and approved by the Industrial Commission. (1929, c. 120, s. 18.)

§ 97-18. Prompt payment of compensation required; installments; notice to Commission; penalties. — Compensation under this article shall be paid periodically, promptly and directly to the person entitled thereto un-

less otherwise specifically provided.

(a) The first installment of compensation payable under the terms of an agreement shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments weekly except where the Commission determines that payment in installments should be made monthly or at some other period.

(b) The first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the court upon an appeal from such an award, shall become due seven days from the date of such an award or from the date of such a judgment of the court, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments weekly, except where the Commission determines that payment in installments shall be made monthly or in some other manner.

(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the Commission, in accordance with the form prescribed by the Commission, that payment of compensation has be-

gun or has been suspended, as the case may be.

(d) If any installment of compensation payable in accordance with the terms

of an agreement approved by the Commission without an award is not paid within fourteen days after it becomes due, as provided in subdivision (a) of this section, or if any installment of compensation payable in accordance with the terms of an award by the Commission is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(e) Within sixteen days after final payment of compensation has been made, the employer shall send to the Commission a notice, in accordance with a form prescribed by the Commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the Commission within such time, the Commission shall assess against such employer a civil penalty in the amount of \$25.00. (1929, c. 120, s. 18½.)

§ 97-19. Liability of principal contractors; certificate that subcontractor has complied with law; right to recover compensation of those who would have been liable; order of liability. - Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such subcontractor has complied with § 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service less than five employees in the same business within this State, to the same extent as such subcontractor would be if he had accepted the provisions of this article for the payment of compensation and other benefits under this article on account of the injury or death of any employee of such subcontractor, due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the principal contractor, intermediate contractor, or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any employee of such subcontractor for compensation or other benefits under this article. The Industrial Commission, upon demand, shall furnish such certificate, and may charge therefor the cost thereof, not to exceed twenty-five (25) cents.

Any principal contractor, intermediate contractor, or subcontractor paying compensation or other benefits under this article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons, or corporation who, independently of such provision, would have been liable for the payment thereof.

Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer.

The principal or owner may itsure any or all of his contractors and their employees in a blanket policy, and when so insured such contractor's employees will be entitled to compensation benefits regardless of whether the relationship of employer and employee exists between the principal and the contractor. (1929, c. 120, s. 19; 1941, c. 358, s. 1; 1945, c. 766.)

Editor's Note. — The 1941 amendment inserted the words "irrespective of whether such subcontractor has regularly in service less than five employees in the same business within the State" in the first sentence.

The 1945 amendment added the last paragraph of this section.

In General.—This section is not in reality an amendment in the sense that it changed an existing law, but really amounts

to an amendment for the purpose of expressing the full legislative intent under the existing law. Graham v. Wall, 220 N. C. 84, 16 S. E. (2d) 691 (1941).

Section Not Applicable to Employers and Independent Contractors.—This section relates to contractors and subcontractors and not to employers and independent contractors. Beach v. McLean, 219 N. C. 521, 14 S. E. (2d) 515 (1941).

This Section Modifies § 97-2 (a).—As a general proposition, the only private employments covered by the Workmen's Compensation Act are those "in which five or more employees are regularly employed in the same business or establishment." See § 97-2 (a). But this general rule is subject to the exception created by this section, which was manifestly enacted to protect the employees of financially irresponsible subcontractors who do not carry workmen's compensation insurance, and to prevent principal contractors, immediate

contractors, and subcontractors from relieving themselves of liability under the Act by doing through subcontractors what they would otherwise do through the agency of direct employees. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Number of Persons Regularly Employed by Contractor Is Immaterial.—Where a contractor sublets a part of the contract to a subcontractor without requiring from the subcontractor certificate that he had procured compensation insurance or had satisfied the Industrial Commission of his financial responsibility as a self-insurer under § 97-93, such contractor is properly held secondarily liable for compensation to an employee of the subcontractor, even though the contractor regularly employs less than five employees. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949). See § 97-2.

Cited in Sayles v. Loftis, 217 N. C. 674, 9 S. E. (2d) 393 (1940).

- § 97-20. Priority of compensation claims against assets of employer.—All rights of compensation granted by this article shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor. (1929, c. 120, s. 20.)
- § 97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.—No claim for compensation under this article shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.

No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this article shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$500.00. No agreement by an employee to waive his right to compensation under this chapter shall be valid. (1929, c. 120, s. 21.)

Editor's Note.—For a discussion of this section, see 8 N. C. Law Rev. 477. And see 50 S. E. (2d) 504 (1948).

15 N. C. Law Rev. 286.

§ 97-22. Notice of accident to employer.—Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this article prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice, and the Commission

is satisfied that the employer has not been prejudiced thereby. (1929, c. 120,

Finding That Employer Not Prejudiced by Lack of Notice.—A finding by the Commission that the employer has not been prejudiced by the failure of the plaintiff to give notice of the injury within 30 days after the accident, suffices to sustain the award from and after such notice; but not for benefits which may have accrued prior thereto. Eller v. Lawrence Leather Co., 222 N. C. 604, 24 S. E. (2d) 244 (1943).

A finding by the Commission that plaintiff was not capable of coherent, normal thought at the time of his examination by physicians falls short of a finding that he was prevented from giving written notice

of his injury by reason of physical or mental incapacity so as to entitle him to the benefits which may have accrued prior to the giving of such notice. Eller v. Lawrence Leather Co., 222 N. C. 604, 24 S. E. (2d) 244 (1943).

Applied in Lilly v. Belk Bros., 210 N.

C. 735, 188 S. E. 319 (1936).

Cited in Wilson v. Clement Co., 207 N. C. 541, 177 S. E. 797 (1935); Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936); Matros v. Owen. 229 N. C. 472, 50 S. E. (2d) 509 (1948): Jacobs v. Safe Mfg. Co., 229 N. C. 660, 50 S. E. (2d) 738 (1948).

§ 97-23. What notice is to contain; defects no bar; notice personally or by registered letter.—The notice provided in the foregoing section shall state in ordinary language the name and address of the employee, the time, place, nature, and cause of the accident, and of the resulting injury or death; and shall be signed by the employee or by a person on his behalf, or, in the event of his death, by any one or more of his dependents, or by a person in their behalf.

No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby, and then only to

such extent as the prejudice.

Said notice shall be given personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State, or may be sent by registered letter addressed to the employer at his last known residence or place of business. (1929, c. 120, s. 23.)

Applied in Lilly v. Belk Bros., 210 N. C. 735, 188 S. E. 319 (1936).

Cited in Wilson v. Clement Co., 207 N.

C. 541, 177 S. E. 797 (1935); Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948).

§ 97-24. Right to compensation barred after one year; destruction of records.—(a) The right to compensation under this article shall be forever barred unless a claim be filed with the Industrial Commission within one year after the accident, and if death results from the accident, unless a claim be filed

with the Commission within one year thereafter.

(b) If any claim for compensation is hereafter made upon the theory that such claim or the injury upon which said claim is based is within the jurisdiction of the Industrial Commission under the provisions of this article, and if the Commission, or the Supreme Court on appeal, shall adjudge that such claim is not within the article, the claimant, or if he dies, his personal representative, shall have one year after the rendition of a final judgment in the case within which to commence an action at law.

(c) When all claims and reports required by this article have been filed, and the cases and records of which they are a part have been closed by proper reports, receipts, awards or orders, these records, may after five years, in the discretion of the Commission, with and by the authorization and approval of the North Carolina Department of Archives and History, be destroyed by burning or otherwise.

(1929, c. 120, s. 24; 1933, c. 449, s. 2; 1945, c. 766.)

Editor's Note. - The 1933 amendment added subsection (b), and the 1945 amendment added subsection (c).

The requirement that claim be filed within one year is a condition precedent to the right to compensation, and not a statute of limitation. For this reason, where a claim for compensation under the provisions of the Workmen's Compensation Act has not been filed with the Industrial Commission within one year after the date of the accident, which resulted in the injury for which compensation is claimed, or where the Industrial Commission has not acquired jurisdiction of such claim within one year after the date of such accident, the right to compensation is barred. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937).

The requirement that an injured employee file notice of his claim within twelve months from the date of injury, is not a statute of limitations, but a condition precedent to the right to compensation. Lineberry v. Mebane, 218 N. C. 737, 12 S. E.

(2d) 252 (1940).

Report of Accident and Claim of Employee Filed by Employer.—When the employer has filed with the Commission a report of the accident and claim of the injured employee, the claim is filed with the Commission within the meaning of this section. Hardison v. Hampton, 203 N. C. 187, 165 S. E. 355 (1932), distinguished in Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948).

Report Filed by Employer on Verbal Information Is Proper.—Where an employer files a report with the Commission within the prescribed time upon verbal information given by the representative of the employee, the representative not being able to read or write, and the employer admits liability, the report has been properly filed with the Industrial Commission as a claim and it acquires jurisdiction. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

Claim Need Not Be Filed before Bringing Action.—Subsection (b) of this section does not require plaintiff to file a claim with the Industrial Commission, as a court of first instance, before bringing an action in the superior court. The subsection was intended to defer the time in which action in the proper court might be brought when mistaken resort to the Commission has been made. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

Claims Not Filed within Time Prescribed.—Where an employee did not file a claim until more than twelve months after injury, and the employer did not file a report of the accident because it did not have knowledge thereof, although it delivered claimant's wages to him after the disability resulting from the injury, but thought the disability was due to a prior injury, had no knowledge of the subsequent injury, and made no representations that the wages delivered to the claimant were in lieu of compensation, the evidence

supports the findings that the claim was not filed within the time prescribed by this section. Lilly v. Belk Bros., 210 N. C. 735, 188 S. E. 319 (1936).

Claimant was injured by accident arising out of and in the course of his employment. He reported the accident to the employer, who, on the day of the accident, reported it to the Industrial Commission as required by § 97-92. Subsequently bills for medical services rendered claimant as a result of the injury were approved for payment by the Commission. No claim for compensation was filed by the employee, the employer or the insurance carrier. More than a year after the accident the employee first discovered the serious effects of the accident and requested a hearing before the Industrial Commission. It was held that no claim for compensation having been filed within twelve months from the date of the accident and no request for a hearing having been made within that time, and no payment of bills for medical treatment having been made within the twelve months prior to the request for a hearing, the claim was barred by this section. Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948), distinguishing Hardison v. Hampton, 203 N. C. 187, 165 S. E. 355 (1932), and Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

Limitation Tolled as to Employee under Eighteen and without Guardian. — The limitation of time provided by this section as against an employee under 18 years of age, who is without guardian or other legal representative, is tolled until he arrives at the age of 18. Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429 (1941).

Prosecuting Common-Law Action and Failing to File Application for Hearing Is Not Abandonment of Filed Claim.-The prosecution of a suit at common law and the failure to file application for a hearing when requested did not amount to an abandonment of claim for compensation, and no final award having been made at the time of the filing of formal petition for an award, the matter was pending at that time before the Commission, and it was error to deny compensation on the ground that claimant was barred by failure to file claim within one year after the death of the deceased employee. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

Implied Agreement Not to Plead Statute. — Where the injured party was led to believe that his wages were accruing to his benefit, and he delayed filing his claim for more than twelve months, it was held that the facts do not bring the case within the principle of equitable estoppel, there being no request by defendant that claimant delay the pursuit of his rights, nor an express or implied agreement not to plead the statute. Wilson v. Clement Co., 207 N. C. 541, 177 S. E. 797 (1935).

Evidence held not to show any representation by the employer that the accident had been reported, or any agreement, express or implied, that the bar of the statute of limitations in this section would not be pleaded, and therefore the employer was not estopped from setting up the defense of the bar of the statute. Jacobs v. Safie Mfg. Co., 229 N. C. 660, 50 S. E. (2d) 738 (1948).

Effect of Dismissal on Rights of Dependents.—Where the claim of an employee under the Compensation Act is dismissed because not filed within one year of the accident, as provided by this section, and pending appeal the employee dies as a result of the accidental injury, his dependents' claim for compensation for his death brought one month after his death is not barred, the dependents not being parties in interest in the prior proceeding, and their claim being an original right enforce-

able only after his death. Wray v. Carolina Cotton, etc., Co., 205 N. C. 782, 172 S. E. 487 (1934), decided prior to the 1933 amendment.

Award Protecting Employee against Possible Loss of Rights after One Year .-Where claimant suffered a general partial disability, but continued to receive the same wages, which amounted to more than the assessable amount of compensation for his injury, he could not receive additional compensation. To protect the employee against the possibility that the employer might, after the expiration of 12 months (§ 97-24), discontinue the employment and thus defeat the rights of the employee, the Commission, after finding the existence of the disability, directed that an award issue subject to specified limitations. It directed compensation at the statutory rate "at any time it is shown that the claimant is earning less," etc., during the statutory period of 300 weeks. By this order the Commission, in effect, retained jurisdiction for future adjustments. In so doing it did not exceed its authority. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948).

§ 97-25. Medical treatment and supplies.—Medical, surgical, hospital, and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from date of injury to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

The refusal of the employee to accept any medical, hospital, surgical or other treatment when ordered by the Industrial Commission, shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical or other care as herein specified, a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission: Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject

to the approval of the Industrial Commission. (1929, c. 120, s. 25; 1931, c. 274, s. 4; 1933, c. 506.)

Editor's Note. — The 1931 amendment struck out the provisions on voluntary treatment furnished by the employer and inserted a sentence empowering the Commission on request of the employee to order a change of treatment at the employer's expense. 9 N. C. Law Rev. 405.

The 1933 amendment added the proviso at the end of this section relating to the

selection of a physician.

As to independent suit by physician against employee to recover for medical services, see notes to §§ 97-90, 97-91.

Insurer's Obligation to Furnish Medical Attention. — An employee brought action against the insurance carrier and its agent, alleging that after his injury the agent, on behalf of insurer, induced him to dispense with the services of his physician and consult physicians selected by insurer, and that insurer promised to provide hospitalization and surgical service recommended by insurer's physicians, but failed to do so to plaintiff's permanent injury. It was held that insurer's obligation to furnish medical attention necessary to plaintiff's complete recovery was founded on this section, and the Industrial Commission has exclusive jurisdiction of plaintiff's claim. Hedgepeth v. Lumbermen's Mut. Cas. Co., 209 N. C

45, 182 S. E. 704 (1935).

Medical, etc., Expenses Not Included in Maximum Amount Recoverable for One Injury.—See Morris v. Laughlin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484, 128 A. L. R. 132 (1940).

Additional Medical Treatment to Lessen Period of Disability.—The provision of this section that the employer should be liable for additional medical treatment to effect a cure or give relief is limited by the provision of this section to cases in which such additional medical treatment would tend to lessen the period of the employee's disability, and the discretionary power to award such additional medical treatment is also subject to this limitation; nor may liability for medical attention be extended upon the ground that public policy demands that the care of a permanently disabled employee should not be cast upon the State, the extent of liability under the Act being definitely prescribed by its provisions. Millwood v. Firestone Cotton Mills, 215 N. C. 519, 2 S. E. (2d) 560

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948).

§ 97-26. Liability for medical treatment measured by average cost in community; malpractice of physician.—The pecuniary liability of the employer for medical, surgical, hospital service or other treatment required, when ordered by the Commission, shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person, and the employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident, and shall be compensated for as such. (1929, c. 120, s. 26.)

Injury or suffering sustained by employee in consequence of malpractice of a physician or surgeon furnished by the employer or carrier is not ground for an independent action; under this section it is a constituent element of the employee's injury for which he is entitled to compensation. In such event the employer and the carrier are primarily liable and the question of secondary liability is eliminated. Hoover

v. Globe Indemnity Co., 202 N. C. 655, 163 S. E. 758 (1932).

As to independent suit by physician against employee to recover for medical services, see notes to §§ 97-90, 97-91.

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948).

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.—After an injury, and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Industrial Commission, shall submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission. The employee shall have the right to have present at such examination any duly qualified physician or surgeon

provided and paid by him. No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this article or any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this article. If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this article shall be suspended until such refusal or objection ceases, and no compensation shall at any time be payable for the period of obstruction, unless in the opinion of the Industrial Commission the circumstances justify the refusal or obstruction. The employer, or the Industrial Commission, shall have the right in any case of death to require an autopsy at the expense of the party requesting the same. (1929, c. 120, s. 27.)

§ 97-28. Seven-day waiting period; exceptions.—No compensation shall be allowed for the first seven calendar days of disability resulting from an injury, except the benefits provided for in § 97-25. Provided, however, that in the case the injury results in disability of more than twenty-eight (28) days, the compensation shall be allowed from the date of the disability. (1929, c. 120, s. 28.)

Cited in Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

§ 97-29. Compensation rates for total incapacity.—Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to 60 per centum of his average weekly wages, but not more than twenty-four dollars, nor less than eight dollars, a week; and in no case shall the period covered by such compensation be greater than four hundred weeks, nor shall the total amount of all compensation exceed six thousand dollars. Except that in cases in which total disability is due to paralysis resulting from injuries to the spinal cord, compensation including reasonable and necessary medical and hospital care shall be paid during the life of the injured employee, without regard to the four hundred weeks limited herein, or to the six thousand dollars (\$6,000.00) maximum compensation under this article. vided, however, should death result from the injury and within three hundred and fifty weeks from the date of the accident and before the maximum compensation is paid, compensation for the remaining weeks or until the full six thousand dollars (\$6,000.00) including two hundred dollars (\$200.00) funeral expense shall be paid as in any other death case and as provided for in §§ 97-38 and 97-40 of this article.

In cases of total and permanent disability due to paralysis resulting from an injury to the spinal cord the Commission may, in its discretion taking into consideration the financial need and necessity of the injured employee, enter an award and pay compensation and reasonable, necessary medical, nursing, hospital and other treatment expenses from the second injury fund during the life of the injured employee where the injury occurred prior to the effective date of this amendment and compensation is still being paid or in cases where the last payment of compensation has been made subsequent to January 1, 1941; such compensation to be paid only from April 4, 1947 and after the employer's liability for compensation, medical, nursing, hospital and other treatment expenses has ceased; but when compensation is allowed in any case under this amendment, the Commission may authorize payment of medical, nursing, hospital and other treatment expenses accrued prior to the date compensation was allowed but after the employer's liability therefor has ceased; provided funds are available after paying claims in second injury cases; provided, further, should the fund be insufficient to pay compensation, medical, nursing and hospital expenses, then the said expenses shall be paid first and compensation thereafter according to the availability of funds.

The basis for compensation of members of the North Carolina National Guard and the North Carolina State Guard shall be the maximum amount of twenty-four dollars per week as fixed herein. The basis for compensation of deputy sheriffs, or those acting in the capacity of deputy sheriffs, who serve upon a fee basis shall be the minimum amount of eight dollars a week as fixed herein. Provided that the last sentence herein shall not apply to Ashe, Avery, Bladen, Carteret, Caswell, Cherokee, Gates, Hyde, Macon, Pender, Perquimans, Union, Watauga and Wilkes counties. (1929, c. 120, s. 29; 1939, c. 277, s. 1; 1943, c. 502, s. 3; c. 543; c. 672, s. 2; 1945, c. 766; 1947, c. 823; 1949, c. 1017.)

Editor's Note.—The 1939 amendment added the last sentence, the proviso to which was added by the second 1943 amendment. The first 1943 amendment increased the maximum weekly compensation, and the third 1943 amendment added the first sentence of the last paragraph.

The 1945 amendment struck out the former second sentence which read: "In case of death the total sum paid shall be six thousand dollars less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of deceased."

The 1947 amendment, effective April 4, 1947, increased the weekly compensation, added the second sentence and the proviso to the first paragraph and inserted the second paragraph, which was rewritten by the 1949 amendment, which became effective April 15, 1949.

For a discussion of this section, see 8 N. C. Law Rev. 427. For comment on the 1943 amendments, see 21 N. C. Law Rev. 384. As to the 1949 amendment, see 27 N. C. Law Rev. 495.

Construction Generally.—Construing the Workmen's Compensation Act as a whole to effectuate the intent and purpose of the legislature, it is held that the purpose of the Act is to provide compensation for the employee injured in case the injury is not fatal, and for those dependent upon him in case the injury is fatal, and the clause of this section purporting to provide for the personal representative of the deceased is construed to be repugnant to and irreconcilable with the other provisions of the Act,

and should be disregarded in giving effect to its other provisions, §§ 97-38 and 97-40 providing in clear language and comprehensive detail for a full legal method of determining compensation for fatal injuries, and where a dependent has been awarded compensation under said sections she is not entitled to the maximum award as administratrix under this section. Smith v. Carolina Power & Light Co., 198 N. C. 614, 152 S. E. 805 (1930).

This section should be construed in pari materia with § 97-31 allowing compensation for the loss of members, and so construed it is held that where an employee has suffered an injury to his hand arising out of and in the course of his employment, and the injury causes him total temporary disability in the course of its healing, and renders it necessary to amputate certain parts of certain fingers of the hand. he is entitled to receive compensation under this section for total temporary disability, and in addition thereto compensation for the loss of the parts of his fingers under § 97-31, there being no provision in the Act that the latter should preclude the former, compensation for the latter to begin upon expiration of the compensation for the former. Rice v. Denny Roll & Panel Co., 199 N. C. 154, 154 S. E. 69 (1930).

Quoted in Murray v. Nebel Knitting Co., 214 N. C. 437, 199 S. E. 609 (1938).

Cited in Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942); Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

§ 97-30. Partial incapacity.—Except as otherwise provided in § 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than twenty-four dollars a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be de-

ducted from the maximum period herein allowed for partial disability. (1929, c. 120, s. 30; 1943, c. 502, s. 4; 1947, c. 823.)

Editor's Note. — The 1943 amendment increased the maximum weekly compensation from eighteen to twenty-one dollars. and the 1947 amendment increased it to twenty-four dollars.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 384.

The Workmen's Compensation Act is only intended to furnish compensation for loss of earning capacity. Without such loss there is no provision for compensation in this section, although even permanent physical injury may have been suffered. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

Test of Earning Capacity. - Under the Act wages earned, or the capacity to earn wages, is the test of earning capacity, or, to state it differently, the diminution of the power or capacity to earn is the measure of compensability. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

Injuries Also Entitling to Compensation under § 97-31.—An employee sustained injuries resulting in disability of a general nature such as would entitle him to compensation under this section. In addition to such injuries, he had also sustained injuries of a specific nature such as to entitle him to compensation under § 97-31. He is entitled to compensation for the specific injuries under § 97-31, and then, if still disabled as a result of the other injuries, compensation will be paid under this section. Morgan v. Norwood, 211 N. C. 600, 191 S. E. 345 (1937).

Award for Partial Disability Not Increased to Compensation for Total Disability.-When an award has been entered

for total disability for a certain length of time, and for partial disability thereafter for a total of three hundred weeks under this section, the Industrial Commission may not increase the award of compensation to that allowed for total disability, upon its finding that at the time of the review of the award claimant's condition was unchanged and that he was at the time only 50 per cent disabled. Murray v. Nebel Knitting Co., 214 N. C. 437, 199 S. E. 609 (1938), distinguishing Smith v. Swift & Co., 212 N. C. 608, 194 S. E. 106 (1937). See § 97-47 and note.

Award Subject to Limitations. - Where an employee suffered a general partial disability, but continued to receive the same wages, which amounted to more than the assessable compensation for his injury, he could not receive additional compensation. But to protect the employee against the possibility that the employer might, after the expiration of 12 months (§ 97-24), discontinue the employment and thus defeat the rights of the employee, the Commission, after finding the existence of the disability, directed that an award issue subject to specified limitations. It directed compensation at the statutory rate "at any time it is shown that the claimant is earning less," etc., during the statutory period of 300 weeks. By this order the Commission, in effect, retained jurisdiction for future adjustments. In so doing it did not exceed its authority. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943)

Applied in Smith v. Swift & Co., 212 N. C. 608, 194 S. E. 106 (1938).

97-31. Schedule of injuries; rate and period of compensation .-In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the periods specified, and shall be in lieu of all other compensation, including disfigurement, to wit:

(a) For the loss of a thumb, sixty per centum of the average weekly wages

during sixty-five weeks.

(b) For the loss of a first finger, commonly called the index finger, sixty per centum of the average weekly wages during forty weeks.

(c) For the loss of a second finger, sixty per centum of the average weekly

wages during thirty-five weeks.

(d) For the loss of a third finger, sixty per centum of the average weekly wages during twenty-two weeks.

(e) For the loss of a fourth finger, commonly called the little finger, sixty per

centum of the average weekly wages during sixteen weeks.

(f) The loss of the first phalange of the thumb or any finger shall be considered to be equal to the loss of one-half of such thumb or finger, and the compensation shall be for one-half of the periods of time above specified.

- (g) The loss of more than one phalange shall be considered the loss of the entire finger or thumb: Provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.
- (h) For the loss of a great toe, sixty per centum of the average weekly wages during thirty-five weeks.

(i) For the loss of one of the toes other than a great toe, sixty per centum of

the average weekly wages during ten weeks.

(k) The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and the compensation shall be for one-half of the periods of time above specified.

(1) The loss of more than one phalange shall be considered as the loss of the

entire toe.

(m) For the loss of a hand, sixty per centum of the average weekly wages during one hundred and seventy weeks.

(n) For the loss of an arm, sixty per centum of the average weekly wages

during two hundred and twenty weeks.

(o) For the loss of a foot, sixty per centum of the average weekly wages during one hundred and forty-four weeks.

(p) For the loss of a leg, sixty per centum of the average weekly wages during two hundred weeks.

(q) For the loss of an eye, sixty per centum of the average weekly wages during one hundred and twenty weeks.

(r) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of § 97-29.

- (s) For the complete loss of hearing in one ear, sixty per centum of the average weekly wages during seventy weeks; for the complete loss of hearing in both ears, sixty per centum of the average weekly wages during one hundred and fifty
- (t) Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye shall be such proportion of the payments above provided for total loss as such partial loss bears to total loss, except that in cases where there is eighty-five per centum, or more, loss of vision in an eye, this shall be deemed "industrial blindness" and compensated as for total loss of vision of such eye.

(u) The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maximum and minimum as set out in §

97-29.

- (v) In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed two thousand five hundred dollars. In case of enucleation where an artificial eye cannot be fitted and used, the Industrial Commission may award compensation as for serious facial disfigurement.
- (w) In case of serious bodily disfigurement, including the loss or permanent injury to any important organ of the body for which no compensation is payable under the preceding subsections, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the above schedule, the Industrial Commission may award proper and equitable compensation not to exceed two thousand five hundred dollars. (1929, c. 120, s. 31; 1931, c. 164; 1943, c. 502, s. 2.)

 Editor's Note.—The 1931 amendment cisions in the cases of Henninger v. Indus-

or permanent injury to any member or orment, in an apparent effort to meet the de-

added a proviso making the loss or serious trial Commission, 1 N. C. I. C. 3; Porter v. Jennings Cotton Mills, 1 N. C. I. C. 218. gan of the body, not provided for, disfigure- See 8 N. C. Law Rev. 423; 9 N. C. Law Rev. 405.

The 1943 amendment rewrote the section. For comment on the amendment, see 21 N. C. Law Rev. 384.

Amendment Affecting Decisions. — In considering the cases cited below, the changes made in this section by the 1943 amendatory act should be borne in mind.

Former Enumeration of Total Permanent Disabilities Was Not Exclusive.—
The fact that subsection (t) of this section formerly stated that certain injuries should be deemed permanent and total disabilities did not mean that permanent and total disabilities could be found only in those cases enumerated, but that such injuries were conclusively presumed to be permanent total disabilities, and the Commission should so find. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942).

Loss of 95% of Vision of Each Eye.—

Loss of 95% of Vision of Each Eye.—Upon evidence showing that claimant had suffered permanent loss of 95% of the vision of each eye, it was held that, under the 1943 amendment to this section, an award for permanent and total loss of vision of each eye was proper. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Prior to the 1943 amendment it was held that the phrase "total...loss of vision of an eye" in prescribing the amount of compensation to be allowed therefor, meant the total destruction of the vision of the eye as distinguished from the partial loss of such vision. Logan v. Johnson, 218 N. C. 200, 10 S. E. (2d) 653 (1940).

Prior Astigmatism Not Barring Recovery.—In Schrum v. Catawba Upholstering Co., 214 N. C. 353, 199 S. E. 385 (1938), claimant was held entitled to full compensation for total loss of vision of an eye by this section. It was held error to first deduct forty per cent loss due to astigmatism and award claimant only sixty per cent of the amount recoverable for total loss of vision, and this result was not altered by § 97-33.

Provision as to Bodily Disfigurement Is Constitutional. — This section, authorizing the Industrial Commission to award compensation for bodily disfigurement, is sufficiently certain and prescribes the standard for the computation of an award thereunder with sufficient definiteness, and the provision is valid and constitutional and not void as a delegation of legislative power in contravention of Art. I, § 8 of the State Constitution. Baxter v. Arthur Co., 216 N. C. 276, 4 S. E. (2d) 621 (1939).

Discretion of Commission in Awarding Compensation for Disfigurement.—Compensation for disfigurement is not required

by the Act. Its allowance or disallowance is within the legal discretion of the Industrial Commission. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

The statute makes it mandatory on the Commission to award proper and equitable compensation in case of serious facial or head disfigurement. This is not the case in regard to disfigurement of other parts of the body. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942).

Disfigurement must be evidenced by an outward observable blemish, scar or mutilation, under the Workmen's Compensation Act, and it must be so permanent and serious as to hamper or handicap the person in his earning or in securing employment. Branham v. Denny Roll, etc., Co., 223 N. C. 223, 25 S. E. (2d) 865 (1943).

Determining Award for Serious Disfigurement. — In awarding compensation for serious disfigurement the Commission, in arriving at the consequent diminution of earning power, should consider the natural physical handicap resulting, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942).

Same — Limitation on Amount. — The provision of this section relating to serious disfigurement, as it stood before the 1943 amendment, excluded the compensation for facial and head disfigurement from the "weekly compensation payments" contained in the "foregoing schedule of compensation," but not from the limitation upon total compensation under the Act. Arp v. Wood & Co., 207 N. C. 41, 175 S. E. 719 (1934).

Such Award Is Separate.—Weekly compensation under the schedules cannot be increased by the inclusion of compensation for disfigurement. Compensation for disfigurement, if allowed, must be a separate award and the aggregate awards in no case may exceed the total compensation fixed in the Act. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942).

No Award for Disfigurement if One

No Award for Disfigurement if One Made for Total Permanent Disability.—No award can be made for disfigurement where an award has been made for total permanent disability. Likewise, disfigurement must be serious in order that compensation may be allowed therefor. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942).

Disfigurement and Partial Loss of Arm.

—Under this section the Industrial Com-

mission had authority to award compensation for facial and bodily disfigurement, in this case resulting from scar tissue from burns, and to award compensation for partial loss of the use of the arm resulting from such scar tissue, when such awards were supported by competent evidence, provided the award for the disfigurement did not exceed the \$2,500 maximum provided by the Act, and provided that the aggregate of all awards did not exceed the

\$6,000 maximum prescribed by § 97-29. Baxter v. Arthur Co., 216 N. C. 276, 4 S. E. (2d) 621 (1939). See Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942), and note the effect of the 1943 amendment.

Quoted in Maley v. Thomasville Furniture Co., 214 N. C. 589, 200 S. E. 438

Cited in Smith v. Swift & Co., 212 N. C. 608, 194 S. E. 106 (1937).

8 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.—If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified. (1929, c. 120, s. 32.)

against the possibility that an injured employee may refuse to work when, in fact, he is able to work and earn wages, and

The purpose of this section is to guard thus increase or attempt to increase the amount of his compensation. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E_i. (2d) 865 (1943).

§ 97-33. Prorating permanent disability received in other employment.—If any employee has a permanent disability or has sustained a permanent injury in service in the army or navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident, such as specified in § 97-31, he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed. (1929, c. 120, s. 33.)

Applied in Schrum v. Catawba Upholstering Co., 214 N. C. 353, 199 S. E. 385 (1938).

- § 97-34. Employee receiving an injury when being compensated for former injury.—If an employee receives an injury for which compensation is payable, while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries, unless the later injury be a permanent injury such as specified in § 97-31; but he shall be entitled to compensation for that injury and from the time of that injury which will cover the longest period and the largest amount payable under this article. (1929, c. 120, s. 34.)
- 97-35. How compensation paid for two injuries; employer liable only for subsequent injury.—If any employee receives a permanent injury as specified in § 97-31 after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks.

If an employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg, or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only. (1929, c. 120, s. 35.)

§ 97-36. Accidents taking place outside State; employee receiving compensation from another state. — Where an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; provided his contract of employment

was not expressly for service exclusively outside of the State; provided, however, if an employee shall receive compensation or damages under the laws of any other state nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this article. (1929, c. 120, s. 36.)

Editor's Note.—For a discussion of this section, see 8 N. C. Law Rev. 427.

Exclusion of Nonresident Employees Involves No Unconstitutional Discrimination.—The provision of the Compensation Act excluding from its coverage nonresident employees involves no unconstitutional discrimination, the inadvisability of attempting to give the Act extraterritorial effect being a sufficient basis for the provision. Reaves v. Earle-Chesterfield Mill Co., 216 N. C. 462, 5 S. E. (2d) 305 (1939).

When the contract of employment is for services to be rendered exclusively outside the State and such services in fact are performed in their entirety elsewhere than in this State this chapter has no application. Mallard v. Bohannon, 221 N. C. 227, 19 S. E. (2d) 880 (1942).

Concurrence of Three Factors Is Requisite for Jurisdiction.—In order to give the Industrial Commission jurisdiction of the rights of the parties arising out of an injury received by the employee while out of the State, it must appear that the contract of employment was made in this State, that the employee's place of business is in this State, and that the residence of the employee is in this State, and the concurrence of all three facts is prerequisite to its jurisdiction of such injury. Reaves v. Earle-Chesterfield Mill Co., 216 N. C. 462, 5 S. E. (2d) 305 (1939); Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189

(1942).

Temporary Removal from State Not Bar to Recovery.-Claimant testified that he was injured in an automobile accident while he was returning from a salesman's meeting in this State, which he was required to attend, to his home in Florence, S. C.; that he had moved his family to Florence temporarily so he could take them to a nearby beach occasionally; that his headquarters were in Charlotte, N. C., and that he had not given up his residence in this State. It was held that the evidence supports the finding of the Industrial Commission that the employee was a resident of the State at the time of the accident, and that he was covered by the Compensation Act. Brooks v. Carolina Rim, etc., Co., 213 N. C. 518, 196 S. E. 835 (1938).

Whether a contract is expressly for service exclusively outside the State is a question of fact for the determination of the Industrial Commission. Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189 (1942).

Burden of Proof. — Where claimant establishes the jurisdictional facts, the burden is upon the employer and the insurance carrier to show that the contract of employment was expressly for service exclusively outside the State and thus bring themselves within the first proviso of this section. Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189 (1942).

§ 97-37. Where injured employee dies before total compensation is paid. — When an employee receives or is entitled to compensation under this article for an injury covered by § 97-31 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made: First, to the surviving whole dependents; second, to partial dependents, and, if no dependents, to the next of kin as defined in the article; if there are no whole or partial dependents or next of kin as defined in the article, then to the personal representative and second injury fund as provided in the article, in lieu of the compensation the employee would have been entitled to had he lived.

Provided, however, that if the death is due to a cause that is compensable under this article, and the dependents of such employee are awarded compensation therefor, all right to unpaid compensation provided by this section shall cease and determine. (1929, c. 120, s. 37; 1947, c. 823.)

Editor's Note.—Prior to the 1947 amendment the unpaid balance was paid to the employee's next of kin dependent upon him for support.

An award inadvertently entered by the

Industrial Commission after the death of the claimant on appeal from the award is irregular, but not void, and the proceedings do not abate. Butts v. Montague, 204 N. C. 389, 168 S. E. 215 (1933).

8 97-38. Where death results proximately from the accident; dependents: burial expenses: compensation to aliens: election by partial dependents.—If death results proximately from the accident and within two years thereafter, or while total disability still continues, and within six years after the accident, the employer shall pay for or cause to be paid, subject, however, to the provisions of the other sections of this article in one of the methods hereinafter provided, to the dependents of the employee, wholly dependent upon his earnings for support at the time of accident, a weekly payment equal to 60 per centum of his average weekly wages, but not more than twenty-four dollars, nor less than eight dollars, a week for a period of three hundred and fifty weeks from the date of the injury, and burial expenses not exceeding two hundred dollars. If the employee leaves dependents only partly dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid, as aforesaid, shall equal the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury: Provided, when the partial dependents are all next of kin as defined in § 97-40, and all so elect, they may receive benefits under § 97-40 instead of under this section. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred and fifty weeks from the date of the injury. Compensation under this article to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child, or children, to surviving father or mother whom the employee has supported, either wholly or in part for the period of one year prior to the date of the injury, and except that the Commission may, at its option, or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission. (1929, c. 120, s. 38; 1943, c. 163; c. 502, s. 5; 1947, c. 823.)

Cross Reference. — For definitions of terms, see § 97-2.

Editor's Note.—The first 1943 amendment added the proviso to the second sentence. The second 1943 amendment increased the maximum weekly payment specified in the first sentence from eighteen to twenty-one dollars. The 1947 amendment increased it to twenty-four dollars and raised the minimum from seven to eight dollars.

For discussion of section, see 8 N. C. Law Rev. 427. And for comment on the 1943 amendment, see 21 N. C. Law Rev. 384.

Proximate Cause.—The employer is required to pay compensation for death of employee only when the death results proximately from injury by accident arising out of and in the course of employment. Gilmore v. Hoke County Board of Education, 222 N. C. 358, 23 S. E. (2d) 292 (1942).

Instance of Total Dependency. — Where the evidence tended to show that the mother of the deceased employee lived

with him, that he paid the rent, bought groceries and supported her for a period of years, but that for two months prior to his death she did washing and nominal services for, and staved with, an aged bedridden person and earned \$5.75 per week thereby, which she deposited in a bank or used to buy small luxuries, the fact that the mother earned small amounts of money in temporary and casual employment does not indicate any dependable source of income other than that she received from her son and the conclusion of the Industrial Commission that she was totally dependent upon her son within the meaning of the Compensation Act is sustained. Thomas v. Raleigh Gas Co., 218 N. C. 429, 11 S. E. (2d) 297 (1940).

Finding as to Dependency Binding on Appeal.—While it may be admitted that in some instances the question of dependency may be a mixed question of fact and law, where the facts admitted or found by the Commission upon competent evidence support the conclusion of the Commission in regard thereto, its award is binding on the

court. Thomas v. Raleigh Gas Co., 218 N. 198 N. C. 621, 152 S. E. 809 (1930); Early C. 429, 11 S. E. (2d) 297 (1940).

Cited in Smith v. Collins-Aikman Corp.,

v. Basnight & Co., 214 N. C. 103, 198 S. F. 577 (1938).

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.—A widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. If there is more than one person wholly dependent, the death benefit shall be divided among them; the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent, and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

The widow, or widower and all children of deceased employees shall be conclusively presumed to be dependents of deceased and shall be entitled to receive the benefits of this article for the full periods specified herein. (1929, c. 120,

Cross Reference. — For definition of terms "widow," "widower," and "child,"

Editor's Note. - The determination of the extent of the dependency of partial dependents has proven troublesome. See 8 N. C. Law Rev. 426.

The common-law wife of a deceased employee is not entitled to compensation under the provisions of this Act. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 154 S. E. 66 (1930).

Illegitimate Child Acknowledged by Father. - An illegitimate child, born after the death of its father, who before his death had acknowledged his paternity of the child, is a dependent of its deceased father within the meaning of this section. and such child is entitled to share with children of its deceased father who were born of his marriage to their mother, from whom their father had been divorced prior to his death, in compensation awarded under this Act to his dependents. Lippard v. Southeastern Exp. Co., 207 N. C. 507, 177 S. E. 801 (1935).

Cited in Smith v. Collins-Aikman Corp., 198 N. C. 621, 152 S. E. 809 (1930).

§ 97-40. Commutation of benefit and payment on absence of dependents; Second Injury Fund .- If the deceased employee leaves no dependents the employer shall pay to the next of kin as herein defined the commuted amount provided for in § 97-38 for whole dependents; but if the deceased left no next of kin as herein defined, then said commuted amount shall be paid to the Industrial Commission to be held and disbursed by it in the manner hereinafter provided; one-half of said commuted amount shall be retained by the Industrial Commission and the other one-half paid to the personal representative of the deceased to be by him distributed to the next of kin as defined in the Statutes of Distribution; but if there be no next of kin as defined in the Statutes of Distribution, then the personal representative shall pay the same to the Industrial Commission after payment of costs of administration. For the purpose of this section the term "next of kin" shall include only father, mother, widow, child, brother, or sister of the deceased.

For the purpose of providing additional money for the Second Injury Fund, hereinafter provided for, the Industrial Commission shall assess against the employer or its insurance carrier the payment of twenty-five dollars (\$25.00) in all cases of permanent partial disability where there is a loss of, or loss of use of, each minor member; and one hundred dollars (\$100.00) in each case of a major member where the permanent partial disability is fifty per cent (50%) or more loss of, or loss of use of. Major members are defined as a foot, leg, hand, arm, eye or hearing.

Amounts paid to the Industrial Commission under this section shall constitute a Second Injury Fund, to be held by the Commission and disbursed by it in unusual cases of second injuries as follows: (1) To provide additional compensation in case of second injuries referred to in § 97-33: Provided, however, such additional compensation when added to the compensation awarded under said section, shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident: Provided, further, that the original and the increased permanent disabilities were each at least 20% of the entire member. (2) To provide for an injured employee who has sustained permanent total disability, in the manner referred to in § 97-35, compensation in addition to the compensation which shall be awarded under said section; such additional compensation, however, when added to the compensation awarded under said section shall not exceed the compensation for permanent total disability as provided in § 97-29.

The additional compensation herein provided for is to be paid out of the Second Injury Fund exclusively and only to the extent which the assets of said fund shall

permit. (1929, c. 120, s. 40; 1931, c. 274, s. 5; c. 319; 1945, c. 766.)

Editor's Note.—Prior to the 1931 amendment this section provided for a payment to the personal representative of a deceased employee who left no dependents. It was amended so as to direct payment to a narrow class of next of kin specially defined by this section. Failing such persons, a more complicated arrangement is provided. The criginal section was criticised as providing an unjustifiable windfall for nondependent next of kin. The present amendment makes a half-hearted move toward cutting off this bounty for relatives at the expense of the employer, the industry and eventually the public, by turning a part of the money over to the Commission in some cases. A clerical error in the amending act was corrected by Public Laws 1931, c. 319. 9 N. C. Law Rev. 406. For case decided prior to the amendment, see Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 154 S. E. 66 (1930).

The 1945 amendment inserted the second paragraph. It also inserted the second proviso under subdivision (1) of the third paragraph.

For a discussion of the original section,

see 8 N. C. Law Rev. 427.

Payment to Next of Kin. — When a deceased employee leaves no dependents, an award of compensation should be made to his next of kin, under this section, the employee's mother in this case, and the evidence is held sufficient to support the finding that the employee left no dependent or dependents. Hamby v. Cobb, 214 N. C. 813, 1 S. E. (2d) 101 (1939).

§ 97-41. Total compensation not to exceed \$6,000.—The total compensation payable under this article shall in no case exceed six thousand (\$6,000) dollars, except in cases of total disability due to paralysis resulting from injuries to the spinal cord when the terms of § 97-29 shall apply. (1929, c. 120, s. 41; 1947, c. 823.)

Editor's Note. — The 1947 amendment added the exception clause.

The amount allowed for serious facial or head disfigurement is to be included with other amounts allowed an injured employee in determining the total compensation allowed such employee, which in no case may exceed six thousand dollars. Arp v. Wood & Co., 207 N. C. 41, 175 S. E. 719 (1934).

The amount paid by the employer or insurance carrier for medical and surgical treatment and/or hospitalization or other

treatment, including medical and surgical supplies, should not be included in computing the \$6,000.00 maximum amount recoverable for any one injury, since the Compensation Act does not include such medical and hospital expense in defining the word "compensation" but defines compensation as to the money allowance payable to an employee or his dependents, including funeral benefits provided by the Act. Morris v. Laughlin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484, 128 A. L. R. 132 (1940).

§ 97-42. Deduction of payments.—Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this article were not due and payable when made, may, subject to the approval of the Industrial Commission, be deducted from the amount

to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment. (1929, c. 120, s. 42.)

- § 97-43. Commission may prescribe monthly or quarterly payments.—The Industrial Commission, upon application of either party, may, in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize compensation to be paid monthly or quarterly instead of weekly. (1929, c. 120, s. 43.)
- § 97-44. Lump sums.—Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases, where the parties agree and the Industrial Commission deems it to be to the best interest of the employee or his dependents, or where it will prevent undue hardships on the employer or his insurance carrier, without prejudicing the interests of the employee or his dependents, be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the Commission, but in no case to exceed the commutable value of the future installments which may be due under this article. The Commission, however, in its discretion, may at any time in the case of a minor who has received permanently disabling injuries, either partial or total, provide that he be compensated, in whole or in part, by the payment of a lump sum, the amount of which shall be fixed by the Commission, but in no case to exceed the commutable value of the future installments which may be due under this article. (1929, c. 120, s. 44.)

Editor's Note.—For a discussion of this section, see 8 N. C. Law Rev. 427.

- § 97-45. Reducing to judgment outstanding liability of insurance carriers withdrawing from State.—Upon the withdrawal of any insurance carrier from doing business in the State that has any outstanding liability under the Workmen's Compensation Act, the Insurance Commissioner shall immediately notify the North Carolina Industrial Commission, and thereupon the said North Carolina Industrial Commission shall issue an award against said insurance carrier and commute the installments due the injured employee, or employees, and immediately have said award docketed in the superior court of the county in which the claimant resides, and the said North Carolina Industrial Commission shall then cause suit to be brought on said judgment in the state of the residence of any such insurance carrier, and the proceeds from said judgment after deducting the cost, if any, of the proceeding, shall be turned over to the injured employee, or employees, taking from such employee, or employees, the proper receipt in satisfaction of his claim. (1933, c. 474.)
- § 97-46. Lump sum payments to trustee; receipt to discharge employer.—Whenever the Industrial Commission deems it expedient, any lump sum, subject to the provisions of § 97-45, shall be paid by the employer to some suitable person or corporation appointed by the superior court in the county wherein the accident occurred, as trustee, to administer the same for the benefit of the person entitled thereto, in the manner provided by the Commission. The receipt of such trustee for the amount as paid shall discharge the employer or anyone else who is liable therefor. (1929, c. 120, s. 45.)
- § 97-47. Change of condition; modification of award.—Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review

shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after twelve months from the date of the last payment of bills for medical or other treatment, paid pursuant to this article. (1929, c. 120, s. 46; 1931, c. 274, s. 6; 1947, c. 823.)

Editor's Note.—The 1931 amendment struck out the words "last award" formerly appearing in the second sentence and inserted in lieu thereof the words "last payment of compensation pursuant to an award under this article."

The 1947 amendment added the exception clause at the end of the section.

Commission May Alter Compensation Only Upon a "Change in Condition."-The Industrial Commission is given authority to review an award and end, diminish or increase the compensation previously awarded only when there has been a "change in condition" of the claimant, as provided in this section. And when an award has been entered for total disability for a certain length of time, and for partial disability thereafter for a total of three hundred weeks under § 97-30, the Industrial Commission may not, upon a review of the award on claimant's application prior to the payment of the last installment of the award, increase the award of compensation to that allowed for total disability under § 97-29, upon its finding that claimant was unable to earn any appreciable sum by his labor, when the Commission also finds that at the time of the review of the award claimant's condition was unchanged and that he was at that time only 50 per cent disabled. Murray v. Nebel Knitting Co., 214 N. C. 437, 199 S. E. 609 (1938).

Where there is ample evidence to support a finding of a change in claimant's condition as contemplated by this section,

and evidence which would support a contrary finding, the finding of the Industrial Commission from the conflicting evidence is conclusive. Knight v. Ford Body Co., 214 N. C. 7, 197 S. E. 563 (1938).

The review of an award for change of condition must be made within twelve months from the date of the last payment of compensation pursuant to an award, and while the right to review is enlarged by the 1947 amendment to include instances in which only medical or other treatment bills are paid, the amendment provides for review in such cases only within twelve months of the date of last payment of such bills. Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948).

Where the findings of the Industrial Commission, supported by evidence, are to the effect that a review of the award of compensation is sought by an employee more than twelve months from the date of the last payment, the order of the Commission denying further compensation will be upheld by the courts in view of this section. Lee v. Rose's 5-10-25c Stores, 205 N.

C. 310, 171 S. E. 87 (1933).

Applied in Smith v. Swift & Co., 212 N. C. 608, 194 S. E. 106 (1937); Knight v. Ford Body Co., 214 N. C. 7, 197 S. E. 563 (1938).

Stated in Russell v. Western Oil Co., 206

N. C. 341, 174 S. E. 101 (1934).

Cited in Butts v. Montague Bros., 208 N. C. 186, 179 S. E. 799 (1935); Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948).

- § 97-48. Receipts relieving employer; payment to minors; when payment of claims to dependents subsequent in right discharges employer.—(a) Whenever payment of compensation is made to a widow or widower for her or his use, or for her or his use and the use of the child or children, the written receipt thereof of such widow or widower shall acquit the employer: Provided, however, that in order to protect the interests of minors or incompetents the Industrial Commission may at its discretion change the terms of any award with respect to whom compensation for the benefit of such minors or incompetents shall be paid.
- (b) Whenever payment is made to any person eighteen years of age or over, the written receipt of such person shall acquit the employer.
- (c) Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer, unless and until such dependent or dependents prior in right shall have given notice of his or their claims. In case the employer is in doubt as to the re-

spective rights of rival claimants, he may apply to the Industrial Commission to decide between them.

(d) A minor employee under the age of eighteen (18) years may sign agreements and receipts for payments of compensation for temporary total disability, and such agreements and receipts executed by such minor shall acquit the employer. Where the injury results in a permanent disability and the sum to be paid does not exceed five hundred dollars the minor employee may execute agreements and sign receipts and such agreements and receipts shall acquit the employer; provided, that when deemed necessary the Commission may require the signature of a parent or person standing in place of a parent. (1929, c. 120, s. 47; 1931, c. 274, s. 7; 1945, c. 766.)

Editor's Note.—The 1931 amendment rewrote this section, and the 1945 amendment C. 257, 13 S. E. (2d) 429 (1941).

§ 97-49. Benefits of mentally incompetent or minor employees under 18 may be paid to a trustee, etc.—If an injured employee is mentally incompetent or is under eighteen years of age at the time when any right or privilege accrues to him under this article, his guardian, trustee, or committee may in his behalf claim and exercise such right or privilege. (1929, c. 120, s. 48.)

Declaration of Common-Law Rule.— common-law rule. Lineberry v. Mebane, This section is a mere declaration of the 219 N. C. 257, 13 S. E. (2d) 429 (1941).

§ 97-50. Limitation as against minors or mentally incompetent.— No limitation of time provided in this article for the giving of notice or making claim under this article shall run against any person who is mentally incompetent, or a minor dependent, as long as he has no guardian, trustee, or committee. (1929, c. 120, s. 49.)

Application of Section.—This section is applicable only to the mentally incompetent and the minor dependent. Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d)

429 (1941).

Cited in Lineberry v. Mebane, 218 N. C. 737, 12 S. E. (2d) 252 (1940).

- § 97-51. Joint employment; liabilities. Whenever an employee, for whose injury or death compensation is payable under this article, shall at the time of the injury be in joint service of two or more employers subject to this article, such employers shall contribute to the payment of such compensation in proportion to their wages liability to such employee; provided, however, that nothing in this section shall prevent any reasonable arrangement between such employers for a different distribution as between themselves of the ultimate burden of compensation. (1929, c. 120, s. 50.)
- § 97-52. Occupational disease made compensable; "accident" defined. — Disablement or death of an employee resulting from an occupational disease described in § 97-53 shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workmen's Compensation Act and the procedure and practice and compensation and other benefits provided by said Act shall apply in all such cases except as hereinafter otherwise provided. The word "accident," as used in the Workmen's Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer, and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this article: Provided, however, no compensation shall be payable for asbestosis and/or silicosis as hereinafter defined if the employee, at the time of entering into the employment of the employer by whom compensation would otherwise be payable, falsely represented himself in writing as net

having previously been disabled or laid off because of asbestosis or silicosis. (1935, c. 123.)

The rights and remedies of an employee under the Compensation Act exclude all other rights and remedies, and an employee bound by the Act may not maintain an action at common law against the employer and his foreman to recover for injuries caused by an occupational disease not enumerated in this and the following section, even though the disease is the result of negligence. Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536 (1938).

Disease Resulting from Accident. - This section, providing that only the occupational diseases specified in this article shall be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and conditions inherent and usual in the nature of the employment, and does not preclude compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment. MacRae v. Unemployment Compensation Comm., 217 N. C. 769, 9 S. E. (2d) 595 (1940). See Blassingame v. Southern Asbestos Co., 217 N. C. 223, 7 S. E. (2d) 478 (1940).

Special Provisions Relating to Asbestosis and Silicosis. - When the special provisions of the occupational disease amendment relating to asbestosis and silicosis are read in their entirety, it is apparent that they are designed to effect these objects:
(1) To prevent the employment of unaffected persons peculiarly susceptible to asbestosis or silicosis in industries with dust hazards; (2) to secure compensation to those workers affected with asbestosis or silicosis, whose principal need is compensation; and (3) to provide compulsory changes of occupations for those workmen affected by asbestosis or silicosis, whose primary need is removal to employments without dust hazards. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797

A proper consideration of the special provisions relating to asbestosis and silicosis must rest upon a conviction that in passing these laws the legislature gave due heed to the nature of these diseases. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

Cited in Edwards v. Piedmont Pub. Co., 227 N. C. 184, 41 S. E. (2d) 592 (1947).

- § 97-53. Occupational diseases enumerated; when due to exposure to chemicals; heart diseases of members of fire department.—The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this article:
 - I. Anthrax.
 - Arsenic poisoning.
 Brass poisoning.

4. Zinc poisoning.

5. Manganese poisoning.

6. Lead poisoning. Provided the employee shall have been exposed to the hazard of lead poisoning for at least thirty days in the preceding twelve months' period, and; provided further only the employer in whose employment such employee was last injuriously exposed shall be liable.

7. Mercury poisoning.8. Phosphorus poisoning.

9. Poisoning by carbon bisulphide, methanol, naphtha or volatile halogenated hydrocarbons.

10. Chrome ulceration.

11. Compressed-air illness.
12. Poisoning by benzol, or by nitro and amido derivatives of benzol (dinitrolbenzol, anilin, and others).

13. Infection or inflammation of the skin or eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors.

14. Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to tar, pitch, bitumen, mineral oil, or parafin, or any compound, product, or residue of any of these substances.

15. Radium poisoning or injury by X-rays.

16. Blisters due to use of tools or appliances in the employment.

17. Bursitis, of the knee or elbow, due to intermittent pressure in the employment.

18. Miner's nystagmus.

19. Bone felon due to constant or intermittent pressure in employment.

20. Synovitis, caused by trauma in employment.

21. Tenosynovitis, caused by trauma in employment.

22. Carbon monoxide poisoning.

23. Poisoning by sulphuric, hydrochloric or hydrofluoric acid.

24. Asbestosis.25. Silicosis.

26. In case of members of fire departments of cities, counties or municipal corporations or political subdivisions of the State, whether such members are voluntary, partly paid or fully paid, coronary thrombosis, coronary occlusion, anginapectoris or acute coronary insufficiency shall each be deemed to be an occupational disease within the meaning of this article, provided:

(a) Such disease develops or first manifests itself during a period while such member is an active member of such department or unit, and

(b) Said member, prior to such manifestation or development, shall have served five consecutive years or more immediately preceding such manifestation or de-

velopment as an active member of said fire service, and

- (c) Said member, upon entering said fire service or not less than five years prior to first manifestation or development of said heart disease, shall have undergone a medical examination, which examination failed to disclose the presence of such disease.
- (d) Cities may adopt their own plans for the purpose of carrying out the intent of this subsection.

For the purpose of the foregoing, the time of development or first manifestation of such diseases shall only be determined by and run from the date of first notice of the existence of such diseases to such member by a physician or the date of death as a result of such diseases.

Occupational diseases caused by chemicals shall be deemed to be due to exposure of an employee to the chemicals herein mentioned only when as a part of the employment such employee is exposed to such chemicals in such form and quantity, and used with such frequency as to cause the occupational disease mentioned in connection with such chemicals. (1935, c. 123; 1949, c. 1078.)

Editor's Note. — The 1949 amendment added subsection 26, which ends with the next to the last paragraph of this section.

For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 495.

Heart Disease. — Prior to the 1949 amendment, making certain heart diseases of fire department members occupational diseases, it was held that heart disease is not an occupational disease. West v. North Carolina Dept. of Conservation and Development, 229 N. C. 232, 49 S. E. (2d) 398 (1948).

Common-Law Actions Excluded as to Certain Occupational Diseases.—In dealing with certain unscheduled occupational diseases, the Supreme Court has held

common-law actions to be excluded by the Workmen's Compensation Act; but in these cases the condition admittedly and allegedly arose out of the employment. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

Conflicting expert testimony on the question of whether the deceased employee died as a result of an occupational disease, caused by exposure to benzol poisoning, arising out of and in the course of his employment, was sufficient to sustain the Commission's award of compensation to the employee's dependent. Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894 (1939).

§ 97-54. "Disablement" defined.—The term "disablement" as used in this article as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated, because of such occupational disease, from performing normal labor in the last occupation in which remuneratively employed; but in all

other cases of occupational disease shall be equivalent to "disability" as defined in § 97-2, paragraph (i), (1935, c. 123.)

Criterion of Disability in Cases of As. bestosis and Silicosis. - There is a radical difference between the criterion of disability in cases of asbestosis and silicosis and that of disability in cases of injuries and other occupational diseases. An employee is disabled by injury or an ordinary occupational disease within the purview of the Workmen's Compensation Act only if he suffers incapacity because of the injury or disease to earn the wages which he was receiving at the time of the injury or disease in the same or any other employment. See § 97-2. But a worker is disabled in cases of asbestosis or silicosis if he is "actually incapacitated, because of such occupational disease, from performing normal labor in the last occupation in

which remuneratively employed." Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

Evidence that plaintiff could do "light work" if no silicosis dust were involved is insufficient to support a finding that he was not disabled from doing "ordinary work," since the two terms are not synonymous in the realm of manual labor. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

The fact that a worker performed his duties with regularity until the date he was dismissed because he was affected with silicosis does not require a finding that he was not disabled at that time as defined by this section. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

- § 97-55. "Disability" defined.—The term "disability" as used in this article means the state of being incapacitated as the term is used in defining "disablement" in § 97-54. (1935, c. 123.)
- § 97-56. Limitation on compensable diseases.—The provisions of this article shall apply only to cases of occupational disease in which the last exposure in an occupation subject to the hazards of such diseases occurred on or after March 26, 1935. (1935, c. 123.)
- § 97-57. Employer liable.—In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

For the purpose of this section when an employee has been exposed to the hazards of asbestosis or silicosis for as much as thirty working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious. (1935, c. 123; 1945, c.

762.)

Editor's Note. — The 1945 amendment

added the second paragraph.

Liability of Insurance Carrier. — The carrier of the insurance during the employee's last thirty day period of exposure to the hazards of an occupational disease is solely liable for compensation allowed for total disability from the occupational disease. This result is not affected by the fact that prior to the time such insurance company became the carrier, medical examinations had disclosed that the employee was suffering with the disease, that the Industrial Commission had advised him as to the compensation and rehabilita-

tion provisions of the Act, but had, in the exercise of its discretion, failed to order him to quit the occupation pursuant to § 97-61. Bye v. Interstate Granite Co., 230 N. C. 334, 53 S. E. (2d) 274 (1949).

This section does not provide for partnership in responsibility, and has nothing to say as to the length of the last employment or the degree of injury which the deleterious exposure must inflict to merit compensation. It takes the breakdown practically where it occurs—with the last injurious exposure. Haynes v. Feldspar Producing Co., 222 N. C. 163, 22 S. E. (2d) 275 (1942).

§ 97-58. Claims for certain diseases restricted; time limit for filing claims.—(a) An employer shall not be liable for any compensation for asbestosis, silicosis or lead poisoning unless disablement or death results within two years after the last exposure to such disease, or, in case of death, unless death follows continuous disability from such disease, commencing within the period of

two years limited herein, and for which compensation has been paid or awarded or timely claim made as hereinafter provided and results within seven years after such last exposure.

(b) The report and notice to the employer as required by § 97-22 shall apply in all cases of occupational disease except in case of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.

(c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within one year after death, disability, or disablement as the case may be. (1935, c. 123; 1945, c. 762.)

Editor's Note.—The 1945 amendment inserted "(a)" at the beginning of the section, substituted "two years" for "three years" in subsection (a) and struck therefrom the former sentence reading: "Claims for all other occupational diseases shall be barred unless claims shall be filed with the Industrial Commission within one year from the disablement or death caused by such occupational disease." The amendment also added subsections (b) and (c).

In this section the legislature recognizes that silicosis is a progressive disease, and provides that an employer may be held liable for compensation for silicosis if disablement results at any time within two years after the last exposure to the disease. Young v. Whitehall Co., 229 N. C. 360, 49 S E. (2d) 797 (1948).

Cited in Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948).

§ 97-59. Employer to provide treatment. — In the event of disability from an occupational disease, the employer shall provide reasonable medical and/or other treatment for such time as in the judgment of the Industrial Commission will tend to lessen the period of disability or provide needed relief; provided, however, medical and/or other treatment for asbestosis and/or silicosis shall not exceed a period of three years nor cost in excess of one thousand (\$1,000.00) dollars in any one year; and, provided further, all such treatment shall be first authorized by the Industrial Commission after consulting with the advisory medical committee. (1935, c. 123; 1945, c. 762.)

Editor's Note.—The 1945 amendment increased the amount mentioned in this section from \$334.00 to \$1,000.00.

§ 97-60. Examination of employees by advisory medical committee; designation of industries with dust hazards. - The compulsory examination of employees and prospective employees as herein provided applies only to persons engaged or about to engage in an occupation which has been found by the Industrial Commission to expose them to the hazards of ashestosis and/or silicosis. The Industrial Commission shall designate by order each industry found subject to any such hazard and shall notify the employers therein before such examinations are required. On and after March 26, 1935, it shall be the duty of every employer, in the conduct of whose business his employees or any of them are subjected to the hazards of asbestosis and/or silicosis, to provide prior to employment necessary examinations of all new employees for the purpose of ascertaining if any of them are in any degree affected by asbestosis and/or silicosis or peculiarly susceptible thereto; and every such employer shall from time to time, as ordered by the Industrial Commission, provide similar examinations for all of his employees whose employment exposes them to the hazards of asbestosis and/or silicosis. At least one member of the advisory medical committee or other physician designated by the Industrial Commission shall make such examinations or be present when any such examination is made. The refusal of an employee to submit to any such examination shall bar such employee from compensation or other benefits provided by this article in the event of disablement and/or death resulting from exposure to the hazards of asbestosis and/or silicosis subsequent to such refusal. It shall be the duty of the Industrial Commission to make and/or order inspections of employments and to keep a record of all employments subjecting employees to the hazards of asbestosis and/or silicosis, and to notify the employer in any case where such hazard shall have been found to exist. The unreasonable failure of an employer to provide for any examination or his unreasonable refusal to permit any inspection herein authorized shall constitute a misdemeanor and shall be punishable as such. (1935, c. 123.)

Applied in Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

§ 97-61. Compensation for employee temporarily removed from hazardous employment; payment for training for readjustment to other work; waiver of right to compensation.—Where an employee, though not actually disabled, is found by the Industrial Commission to be affected by asbestosis and/or silicosis, and it is also found by the Industrial Commission that such employee would be benefited by being taken out of his employment and that such disease with such employee has progressed to such a degree as to make it hazardous for him to continue in his employment and is in consequence removed therefrom by order of the Industrial Commission, or where an employee affected by asbestosis and/or silicosis as hereinbefore set forth is unable to secure employment by reason of such disease, he shall be paid compensation as for temporary total or partial disability, as the case may be, until he can obtain employment in some other occupation in which there are no hazards of such occupational disease: Provided, however, compensation in no such case shall be paid for a longer period than twenty weeks to an employee without dependents, nor for a longer period than forty weeks to an employee with dependents, and in either case said period shall begin from the date of removal from the employment, unless actual disablement from such disease results later and within the time limited in § 97-58. When in any such case the forced change of occupation shall in the opinion of the Industrial Commission require that the employee be given special training in order to properly readjust himself there shall be paid for such training and incidental traveling and living expenses an additional sum which shall not exceed three hundred (\$300.00) dollars, in the case of an employee without dependents, and which shall not exceed five hundred (\$500.00) dollars in the case of an employee with dependents, such payment to be made for the benefit of the employee to such person or persons as the Industrial Commission may direct; provided, however, no such payment shall be made unless the employee accepts the special training herein provided, nor shall payment be made for a longer period of time than the employee shall accept such special training. Except that where it is shown to the satisfaction of the Commission that some other form of rehabilitation will be beneficial to the employee the payments may be authorized therefor in lieu of the special training. If an employee has been so compensated, and whether or not specially trained for another occupation, and he thereafter engages in any occupation which exposes him to hazards of silicosis and/or asbestosis without first having obtained the written approval of the Industrial Commission, neither he, his dependents, personal representative nor any other person shall be entitled to any compensation for disablement or death from silicosis and/or asbestosis: Provided, however, that an employee so affected, as an alternative to forced change of occupation, may, subject to the approval of the Industrial Commission, waive in writing his right to compensation for any aggravation of his condition that may result from his continuing in his hazardous occupation; but in the event of total disablement and/or death as a result of asbestosis and/or silicosis with which the employee was so affected compensation shall nevertheless be payable, but in no case, whether for disability or death or both, for a longer period than one hundred (100) weeks. Such written waiver must be filed with the Industrial Commission, and the Commission shall keep a record of each waiver, which record shall be open to the inspection of any interested person. (1935, c. 123; 1945, c. 762.)

Editor's Note.—The 1945 amendment inserted in the first sentence the words "or and/or silicosis as hereinbefore set forth is

unable to secure employment by reason of such disease." The amendment also inserted the third sentence.

"Occupation" and "Employment" Defined.—The term "occupation" denotes a vocation, trade, or business in which a person engages as the means of making a livelihood. The word "employment," as used in this section, implies continuity and some degree of permanency of occupation for hire or profit. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

Disabled Employee Entitled to Ordinary Compensation. - If an employee is disabled by silicosis from performing normal labor in an occupation subject to the hazard of silica dust, such worker is entitled to ordinary compensation under the general provisions of the Workmen's Compensation Act unless the Industrial Commission further finds that there is a reasonable basis for the conclusion that he shows the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in another occupation free from this hazard. and findings as to disablement and employability in other occupations are necessary for a proper determination by the Commission of the applicability of this section. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

Employee May Contest Order for Compensation under This Section.—A summary order of the Industrial Commission directing that an employee be removed from employment having attendant hazards of silicosis, and stipulating that the employee is entitled to compensation as stipulated in this section, does not preclude the worker from contesting before the Industrial Commission the applicability of the statute to him, since such order is entered without notice or hearing. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

Transferred Employee Must Be Capable of Pursuing Gainful Nonhazardous Occupation. — Obviously, the legislature enacted this section for the paramount purpose of securing to an affected worker undergoing a compulsory change of occupation an independent position as a wage earner in some work free from dust hazards. When the language of the statute is considered in the light of the mischief sought to be avoided and the remedies intended to be applied, it becomes manifest that the legislature has authorized the Industrial Commission to order a forced change of occupation for an employee affected by asbestosis or silicosis, only in case it appears to the Commission that

there is a reasonable basis for the conclusion that such employee possesses the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in some gainful occupation, free from the hazards of asbestosis and silicosis. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

Effect of Failure to Order Change of Occupation.—The carrier of the insurance during the employee's last thirty day period of exposure to the hazards of an occupational disease is solely liable for compensation allowed for total disability from the occupational disease. See § 97-57. This result is not affected by the fact that prior to the time such insurance company became the carrier, medical examinations had disclosed that the employee was suffering with the disease, and that the Industrial Commission had advised him as to the compensation and rehabilitation provisions of the Act, but had, in the exercise of its discretion, failed to order him to quit the occupation. Bye v. Interstate Granite Co., 230 N. C. 334, 53 S. E. (2d) 274 (1949).

Indiscriminate Transfer Leading to Unjust Consequences.—There is a radical difference between the criterion of disability in cases of asbestosis and silicosis (§ 97-54) and that of disability in cases of injuries and other occupational diseases (§ 97-2). The distinction in tests is highly significant, and arises out of the legislative consciousness that any attempt to compel an indiscriminate transfer of workers affected by asbestosis or silicosis from their accustomed occupations to other employments under the economic threat of deprivation of compensation would inevitably lead to unjust and oppressive consequences, because of their doubtful capacity to engage in other work or because of the inherent difficulty of forecasting the courses of their diseases. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

Effect of Voluntary Transfer—Salutary Effects of Transfer.—It is clearly implicit in the special provisions relating to asbestosis and silicosis that the lawmaking body did not contemplate that a worker suffering disablement by asbestosis or silicosis within the meaning of § 97-54 should forfeit any right to ordinary compensation under the general provisions of the Act by voluntarily transferring his activities from an industry with dust hazards to an employment where no such hazards prevail. But the General Assembly did recognize that under exceptional circumstances salutary effects would follow a forced change

of occupation by a worker affected by asbestosis or silicosis. Consequently, the legislature enacted this section. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

§ 97-62. "Silicosis" and "asbestosis" defined.—The word "silicosis" shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of dust of silica or silicates. "Asbestosis" shall mean a characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust. (1935, c. 123.)

Asbestosis is a disease of the lungs occurring in persons working in air laden with asbestos dust. It is infrequent as compared to silicosis, but has somewhat similar symptoms and consequences. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

- § 97-63. Period necessary for employee to be exposed.—Compensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this State, provided no part of such period of two years shall have been more than ten years prior to the last exposure. (1935, c. 123.)
- § 97-64. General provisions of Act to control as regards benefits.—Except as herein otherwise provided, in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workmen's Compensation Act. (1935, c. 123.)

Purpose of Section.—With a view to averting the unjust and oppressive results of an indiscriminate transfer of workers affected by asbestosis or silicosis from their accustomed occupations to other employments under the economic threat of deprivation of compensation, the legislature established, in this section, the general rule

that an employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in § 97-54 should be entitled to ordinary compensation measured by the general provisions of the Workmen's Compensation Act. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

- § 97-65. Reduction of rate where tuberculosis develops.—In case of disablement or death due primarily from silicosis and/or asbestosis and complicated with tuberculosis of the lungs compensation shall be payable as hereinbefore provided, except that the rate of payments may be reduced one-sixth. (1935, c. 123.)
- § 97-66. Claim where benefits are discontinued.—Where compensation payments have been made and discontinued, and further compensation is claimed, whether for disablement, disability, or death from asbestosis, silicosis, or lead poisoning, the claim for such further compensation shall be made within two years after the last payment, but in all other cases of occupational disease claim for further compensation shall be made within one year after the last payment. (1935, c. 123; 1945, c. 762.)

Editor's Note.—Prior to the 1945 amendment this section also related to requirements as to notice of occupational disease to employer or Industrial Commission, and to waiver of notice and claim where payments are made. For present provisions as

to report and notice to employer and time for filing claim, see § 97-58.

For decision under former provisions of this section, see Blassingame v. Southern Asbestos Co., 217 N. C. 223, 7 S. E. (2d) 478 (1940).

§ 97-67. Post-mortem examinations; notice to next of kin and insurance carrier.—Upon the filing of a claim for death from an occupational disease where in the opinion of the Industrial Commission a post-mortem examination is necessary to accurately ascertain the cause of death, such examination shall be ordered by the Industrial Commission. A full report of such examination shall be certified to the Industrial Commission. The surviving spouse or next kin and the employer or his insurance carrier, if their identity and whereabouts

can be reasonably ascertained, shall be given reasonable notice of the time and place of such post-mortem examination, and, if present at such examination, shall be given an opportunity to witness the same. Any such person may be present at and witness such examination either in person or through a duly authorized representative. If such examination is not consented to by the surviving husband or wife or next of kin, all right to compensation shall cease. (1935, c. 123.)

- § 97-68. Controverted medical questions.—If on the hearing of a claim for compensation for asbestosis and/or silicosis, any controverted medical question or questions shall arise, the Industrial Commission shall reserve its decision and award until it shall have received a report from the advisory medical committee; and the Industrial Commission may in its discretion refer to said committee controverted medical questions arising out of other occupational disease claims. (1935, c. 123.)
- § 97-69. Examination by advisory medical committee; inspection of medical reports.—The advisory medical committee, upon reference to it of a case of occupational disease shall notify the employee, or, in case he is dead, his dependents or personal representative, and his employer to appear before the advisory medical committee at a time and place stated in the notice. If the employee be living, he shall appear before the advisory medical committee at the time and place specified then or thereafter and he shall submit to such examinations including clinical and X-ray examinations as the advisory medical committee may require. The employee, or, if he be dead, the claimant and the employer shall be entitled to have present at all such examinations, a physician admitted to practice medicine in the State who shall be given every reasonable facility for observing every such examination whose services shall be paid for by the claimant or by the employer who engaged his services. If a physician admitted to practice medicine in the State shall certify that the employee is physically unable to appear at the time and place designated by the advisory medical committee, such committee may, upon the advice of the Industrial Commission, and on notice to the employer, change the place and/or time of the examination so as to reasonably facilitate the examination of the employee, and in any such case the employer shall furnish transportation and provide for other reasonably necessary expenses incidental to necessary travel. The claimant and the employer shall produce to the advisory medical committee all reports of medical and X-ray examinations which may be in their respective possession or control showing the past or present condition of the employee to assist the advisory medical committee in reaching its conclusions. (1935, c. 123.)
- § 97-70. Report of committee to Industrial Commission. The advisory medical committee, shall, as soon as practicable after it has completed its consideration of a case, report to the Industrial Commission its opinion regarding all medical questions involved in the case. The advisory medical committee shall include in its report a statement of what, if any, physician or physicians were present at the examination on behalf of the claimant or employer and what, if any, medical reports and X-rays were produced by or on behalf of the claimant or employer. (1935, c. 123.)
- § 97-71. Filing report; right of hearing on report.—The advisory medical committee shall file its report in triplicate with the Industrial Commission, which shall send one copy thereof to the claimant and one copy to the employer by registered mail. Unless within thirty days from receipt of the copy of said report the claimant and/or employer shall request the Industrial Commission in writing to set the case for further hearing for the purpose of examining and/or cross-examining the members of the advisory medical committee respecting the report of said committee, said report shall become a part of the record of the case and shall be accepted by the Industrial Commission as expert medical testimony to be con-

sidered as such in connection with all the evidence in the case in arriving at its decision. (1935, c. 123.)

§ 97-72. Appointment of advisory medical committee; terms of office; duties and functions; salaries and expenses.—There shall be an advisory medical committee consisting of three members, who shall be licensed physicians in good professional standing and peculiarly qualified in the diagnosis and/or treatment of occupational diseases. They shall be appointed by the Industrial Commission with the approval of the Governor, and one of them shall be designated as chairman of the committee by the Industrial Commission. The members of committee shall be appointed to serve terms as follows: One for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above mentioned the Industrial Commission shall appoint a successor for a term of six years; except that the terms of the members first appointed shall expire June thirtieth, one thousand nine hundred thirty-six, The function of the committee shall be to conduct examinations and make reports as required by §§ 97-68 to 97-71, and to assist in any post-mortem examinations provided for in § 97-67 when so directed by the Industrial Commission. bers of the committee shall devote to the duties of the office so much of their time as may be required in the conducting of examinations with reasonable promptness, and they shall attend hearings as scheduled by the Industrial Commission when their attendance is desired for the purpose of examining and cross-examining them respecting any report or reports made by them.

The members of the advisory medical committee shall be paid such salaries and/ or fees and expenses, and in monthly installments or in such other manner as may be determined by the Governor and approved by the Advisory Budget Commis-

sion. (1935, c. 123.)

- § 97-73. Expenses of making examinations. The Industrial Commission shall establish a schedule of reasonable charges to defray expenses incurred in making examinations pursuant to §§ 97-60 and 97-67, such charges to be collected in accordance with rules and regulations which shall be adopted by the Industrial Commission. Said charges shall be collected from employers who by order of the Industrial Commission are determined to be subject to the hazards of asbestosis and/or silicosis. (1935, c. 123.)
- § 97-74. Expense of hearings taxed as costs in compensation cases; fees collected directed to general fund.—In hearings arising out of claims for disability and/or death resulting from occupational diseases the Industrial Commission shall tax as a part of the costs in cases in which compensation is awarded a reasonable allowance for the services of members of the advisory medical committee attending such hearings and reasonable allowances for the services of members of the advisory medical committee for making investigations in connection with all claims for compensation on account of occupational diseases, including uncontested cases, as well as contested cases, and whether or not hearings shall have been conducted in connection therewith. All such charges, fees and allowances to be collected by the Industrial Commission shall be paid into the general fund of the State treasury to constitute a fund out of which to pay the expenses of the advisory medical committee. (1935, c. 123.)
- § 97-75. Making up deficiency by assessment upon employers in hazardous industries; provision for annual fund.—In the event the amount appropriated by the General Assembly and the charges, fees and allowances so assessed and collected and paid into the State treasury shall not be sufficient to pay the full cost incurred by the advisory medical committee in making examinations of employees, and conducting post-mortem examinations, and in making investigations of claims arising under this article, and in testifying before the Industrial Commission, the Industrial Commission shall assess against the employers found

by the Industrial Commission to be subject to the hazards of asbestosis and/or silicosis an amount sufficient to pay such cost, said amount to be assessed against such employers pro rata on the basis of annual pay roll. The Industrial Commission is authorized to assess and collect in advance in the beginning of any vear from the employers subject to such hazard an amount estimated as necessary to pay such cost. Said amount when so assessed shall be paid by such employers within ten days after the notice of assessment, and when collected by the Industrial Commission shall be paid into the State treasury as a part of the fund out of which to pay the expenses of the advisory medical committee. In the event such amount so assessed shall be found to be in excess of the cost incurred by such advisory medical committee in the performance of its duties under this article, such excess shall be credited against the estimate of the cost to be incurred by said committee for the succeeding year. In case the amount so assessed shall be insufficient to pay such cost the Industrial Commission is authorized to make an additional assessment to be made at the end of the regular assessment period and to be collected from the employers subject to the hazards of asbestosis and/or silicosis. (1935, c. 123.)

§ 97-76. Inspection of hazardous employments; refusal to allow inspection made misdemeanor. - The Industrial Commission shall make inspections of employments for the purpose of ascertaining whether such employments, or any of them, are subject to the hazards of asbestosis and/or silicosis. and for the purpose of making studies and recommendations with a view to reducing and/or eliminating such hazards. The Industrial Commission, and/or any person selected by it, is authorized to enter upon the premises of employers where employments covered by this article are being carried on to make examinations and studies as aforesaid. Any employer, or any officer or agent of an employer, who unreasonably prevents or obstructs any such examinations or study shall be guilty of a misdemeanor. (1935, c. 123.)

Cited in Young v. Whitehall Co., 229 N.

C. 360, 49 S. E. (2d) 797 (1948).

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.—There is hereby created a commission to be known as the North Carolina Industrial Commission, consisting of three commissioners who shall devote their entire time to the duties of the Commission. The Governor shall appoint the members of the Commission, one for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above mentioned, the Governor shall appoint a successor for a term of six years, and thereafter the term of office of each commissioner shall be six years. Not more than one appointee shall be a person who, on account of his previous vocation, employment or affiliations, can be classed as a representative of employers, and not more than one appointee shall be a person who, on account of his previous vocation, employment or affiliations. can be classed as a representative of employees. One member, to be designated by the Governor, shall act as chairman. (1929, c. 120, s. 51; 1931, c. 274, s. 8.)

Editor's Note. - The 1931 amendment struck out the following words formerly appearing at the end of this section: "And such member so selected as chairman shall not be one who, on account of his previous vocation, employment or affiliations, can be classed either as representative of employers or as representative of employees."

For act authorizing the Industrial Commission to hear and determine certain listed tort claims against certain State departments and agencies, see Session Laws 1949,

c. 1138.

The Industrial Commission is primarily an administrative agency of the State, charged with the duty of administering the provisions of the Workmen's Compensation Act. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936), citing In re Hayes, 200 N. C. 133,

156 S. E. 791 (1931).

The Commission is not a court of general jurisdiction. It can have no implied jurisdiction beyond the presumption that it is clothed with power to perform the duties required of it by the law entrusted to it for administration. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

Jurisdiction Limited.—In its functions as a court, the jurisdiction of the Industrial Commission is limited, and jurisdiction cannot be conferred on it by agreement or waiver. Chadwick v. North Carolina Department of Conservation, etc., 219 N. C. 766, 14 S. E. (2d) 842 (1941).

Commission Is Special Tribunal When Considering Claims.—When a claim for compensation has been filed and the employer and employee has failed to reach

an agreement, the statute authorizes the Commission to hear and determine all matters in dispute. Thereupon, the Commission is constituted a special or limited tribunal, and is invested with certain judicial functions, and possesses the powers and incidents of a court, within the provisions of the Act, and necessary to determine the rights and liabilities of employees and employers. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

Cited in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

§ 97-78. Salaries and expenses; secretary and other clerical assistance; annual report.—(a) The salaries of the chairman and each of the other commissioners shall be fixed by the Governor, subject to the approval of the Advisory Budget Commission, such salaries to be payable in monthly installments.

- (b) The Commission may appoint a secretary whose duties shall be prescribed by the Commission, and whose salary shall be fixed by the Governor and Council of the State and who, upon entering upon his duties, shall give bond in such sum as may be fixed by the Commission, and who may be removed at the will of the Commission. The Commission may also employ such clerical or other assistance as it may deem necessary, and fix the compensation of all persons so employed, such compensation to be in keeping with the compensation paid to the persons employed to do similar work in other State departments.
- (c) The members of the Commission and its assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the Commission, but such expenses shall be certified by the person who incurred the same, and shall be approved by the chairman of the Commission before payment is made.
- (d) All salaries and expenses of the Commission shall be audited and paid out of the State treasury, in the manner prescribed for similar expenses in other departments or branches of the State service, and to defray such salaries and expenses a sufficient appropriation shall be made under the General Appropriation Act as made to other departments, commissions and agencies of the State government.
- (e) The Commission shall publish annually for free distribution a report of the administration of this article, together with such recommendations as the Commission deems advisable. (1929, c. 120, s. 52; 1931, c. 274, s. 9; 1941, c. 358, s. 2; 1947, c. 823.)

Editor's Note.—Prior to the 1931 amendment the salary of the chairman was fixed at \$4500 a year and each of the other commissioners received \$4000.

Prior to the 1941 amendment the salary

of the secretary was to be not more than \$3,600 a year.

The 1947 amendment substituted "certified" for "sworn to" in subsection (c).

- § 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.—(a) The Commission shall be provided with adequate offices in which the records shall be kept and its official business transacted during regular business hours; it shall also be provided with necessary office furniture, stationery, and other supplies.
- (b) The Commission may appoint deputies, who shall have the power to subpoena witnesses and administer oaths, and who may take testimony in such cases as the Commission may deem proper. Such testimony shall be transmitted in writing to the Commission, and the Commission shall fix the compensation of such deputies.

(c) The Commission or any member thereof may hold sessions at any place

within the State as may be deemed necessary by the Commission.

(d) Hearings before the Commission shall be open to the public and shall be stenographically reported, and the Commission is authorized to contract for the reporting of such hearings. The Commission shall by regulation provide for the preparation of a record of the hearings and other proceedings. (1929, c. 120, s. 53; 1931, c. 274, s. 10.)

Editor's Note.—The 1931 amendment struck out, after the word "offices" in subsection (a), the words "in the capitol, or

some other suitable building in the city of Raleigh."

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs. - (a) The Commission may make rules, not inconsistent with this article, for carrying out the provisions of this article. Processes and procedure under this article shall be as summary and simple as reasonably may be. The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this article, to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Any party to a proceeding under this article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the depositions of witnesses residing within or without the State to be taken, the costs to be taxed as other costs by Commission. Such depositions shall be taken after giving the notice and in the manner prescribed by law for depositions in actions at law, except that they shall be directed to the Commission, the commissioner, or the deputy commissioner before whom the proceedings may be pending.

(b) The county sheriffs and their respective deputies shall serve all subpoenas of the Commission or its deputies, and shall receive the same fees as are now provided by law for like services; each witness who appears in obedience to such subpoena of the Commission shall receive for attendance the fees and mileage for witnesses in civil cases in courts of the county where the hearing is held.

(c) The superior court shall, on application of the Commission or any member or deputy thereof, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records.

(1929, c. 120, s. 54.)

Cross Reference.—For decisions relative to jurisdiction, see note to § 97-77.

Editor's Note.—For discussion of sec-

tion, see 8 N. C. Law Rev. 427.

Making Construction and Application of Rules.—Under this section the North Carolina Industrial Commission has the power not only to make rules governing its administration of the Act, but also to construe and apply such rules. Its construction and application of its rules, duly made and promulgated, in proceedings pending before the said Commission, ordinarily are final and conclusive and not subject to review by the courts of this State, on an appeal from an award made by said Industrial Commission. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937).

Rule requiring notice of cancellation of policy to be given to Commission does not become a part of the policy contract. Motsinger v. Perryman, 218 N. C. 15, 9 S.

E. (2d) 511 (1940).

Rule Relative to New Evidence on Review.—The rules of the Industrial Commission, adopted pursuant to this section, relative to the introduction of new evidence on a review by the full Commission, are in accord with the decisions of the Supreme Court as to granting new trials for newly discovered evidence. Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894 (1939).

Procedure before the Industrial Commission need not necessarily conform strictly to judicial procedure in courts of law unless the statute so requires or the court of last resort shall consider such procedure indispensable to the preservation of the essentials of justice and the principles of due process of law, and procedure adopted by the Commission with respect to the reception and consideration of evidence will be given liberal treatment by the courts, since this section empowers the Commission to

make rules for carrying out the provisions of the Act, and requires processes and procedure to be summary and simple. Maley v. Thomasville Furniture Co., 214 N. C.

589, 200 S. E. 438 (1939).

Rehearing.—While there is no direct statutory provision giving the Industrial Commission power to order a rehearing of an award made by it for newly discovered evidence, the Commission has such power in proper instances in accordance with its

rules and regulations, as provided by this section, it being the intent of the legislature, as gathered from the whole Act, to give the Industrial Commission continuing jurisdiction of all proceedings begun before it with appellate jurisdiction in the superior court on matters of law only. Butts v. Montague Bros., 208 N. C. 186, 179 S. E. 799 (1935).

Stated in Worley v. Pipes, 229 N. C. 465,

50 S. E. (2d) 504 (1948).

§ 97-81. Blank forms and literature; statistics; safety provisions; accident reports; studies and investigations and recommendations to General Assembly; to co-operate with other agencies for prevention of injury.— (a) The Commission shall prepare and cause to be printed, and upon request furnish, free of charge to any employee or employer, such blank forms and literature as it shall deem requisite to facilitate or prompt the efficient administration of this article.

(b) The Commission shall tabulate the accident reports received from employers in accordance with § 97-92 and shall publish the same in the annual report of the Commission and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports shall be private records of the Commission, and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages.

(c) The Commission shall make studies and investigations with respect to safety provisions and the causes of injuries in employments covered by this article, and shall from time to time make to the General Assembly and to employers and carriers such recommendations as it may deem proper as to the best means of

preventing such injuries.

- (d) In making such studies and investigations the Commission is authorized (1) to co-operate with any agency of the United States charged with the duty of enforcing any law securing safety against injury in any employment covered by this article, or with any State agency engaged in enforcing any laws to assure safety for employees, and (2) to permit any such agency to have access to the records of the Commission. In carrying out the provisions of this section the Commission or any officer or employee of the Commission is authorized to enter at any reasonable time upon any premises, tracks, wharf, dock, or other landing place, or to enter any building, where an employment covered by this article is being carried on, and to examine any tool, appliance, or machinery used in such employment. (1929, c. 120, s. 55.)
- § 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.—If after seven days after the date of the injury, or at any time in case of death, the employer and the injured employee or his dependents reach an agreement in regard to compensation under this article, a memorandum of the agreement in the form prescribed by the Industrial Commission, accompanied by a full and complete medical report, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.

If approved by the Commission, thereupon the memorandum shall for all purposes be enforceable by the court's decree as hereinafter specified. (1929, c. 120,

s. 56.)

§ 97-83. In event of disagreement, Commission is to make award after hearing.—If the employer and the injured employee or his dependents

fail to reach an agreement, in regard to compensation under this article within fourteen days after the employee has knowledge of the injury or death, or if they have reached such an agreement which has been signed and filed with the Commission, and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

Immediately after such application has been received the Commission shall set the date for a hearing, which shall be held as soon as practicable, and shall notify the parties at issue of the time and place of such hearing. The hearing shall be held in the city or county where the injury occurred, unless otherwise agreed to by the parties and authorized by the Industrial Commission. (1929, c. 120, s. 57.)

Provisions for Settlement of Any Matter in Dispute.-In this section and §§ 97-84 to 97-86 the General Assembly has prescribed an adequate remedy by which any matter in dispute and incident to any claim under the provisions of the Workmen's Compensation Act may be determined and settled. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Remedy Is Exclusive. - The remedy provided by this and the three following sections is exclusive. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Same-Physician's Claim for Services.-The sole remedy of a physician to recover for services to an injured employee, where the employee and employer are subject to the Workmen's Compensation Act, is by implication to the Industrial Commission in accordance with this section and §§ 97-84 to 97-86 to consider plaintiff's bill for such services, notwithstanding that the employer denies liability for the injury on the ground that it did not arise out of and in the course of the employment. The physician may not challenge the constitutionality of the relevant provisions of this chapter by an independent suit against the employee to recover for the medical services. Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948).

Where a physician renders services to an injured employee under private contract without knowledge that the injury was covered by the Compensation Act, and thereafter upon discovery that the injury is

compensable files claim for such services with the Industrial Commission in order that the employee may get the benefit thereof, his remedy upon approval by the Industrial Commission in a sum less than the full amount of his claim, is to request a hearing before the Commission with right of appeal to the courts for review, this section and §§ 97-84 to 97-86, and this remedy is exclusive and precludes the physician from maintaining an action against the employee to recover the full contractual amount for the services and attacking the constitutionality of the relevant provisions of the Compensation Act. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

A proceeding before the Industrial Commission for compensation is not a lawsuit in the strict sense, and many of the prerequisites of an action at law are not required. Thus, an infant employee may prosecute his claim directly without the appointment of a next friend or guardian. Lineberry v. Mebane, 218 N. C. 737, 12 S. E. (2d) 252 (1940).

Proceeding Should Not Be in Name of Deceased Employee.—A proceeding under the Workmen's Compensation Act to determine liability of defendants to the next of kin of a deceased employee should not be brought in the name of the deceased employee. Slade v. Willis Hosiery Mills. 209 N. C. 823, 184 S. E. 844 (1936).

Cited in Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

§ 97-84. Determination of disputes by Commission.—The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by a deputy, in which event he shall swear or cause the witnesses to be sworn, and shall transmit all testimony to the Commission for its determination and award. (1929, c. 120, s. 58.)

Cross Reference.—As to exclusiveness see note to § 97-83. of remedy provided by §§ 97-83 to 97-86,

Fact-Finding Body. - Under this section

the Commission is made a fact-finding body. The finding of facts is one of its primary duties. Beach v. McLean, 219 N. C. 521, 14 S. E. (2d) 515 (1941).

Cited in Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239 (1942); Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

§ 97-85. Review of award.—If application is made to the Commission within seven days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. (1929, c. 120, s. 59.)

Cross Reference.—As to exclusiveness of remedy provided by §§ 97-83 to 97-86, see

note to § 97-83.

Objection to the admission of incompetent evidence should be made before the hearing commissioner, and objection taken for the first time at the hearing before the full Commission on appeal is too late. Maley v. Thomasville Furniture Co., 214 N. C. 589, 200 S. E. 438 (1939).

Hearing New or Additional Testimony. -An appellant to the full Commission has no substantive right to require it to hear new or additional testimony, but the Commission's duty to do so applies only if good ground therefor be shown, and its rules in regard thereto, adopted pursuant to § 97-80, are in accord with the decision of the Supreme Court relating to the granting of new trials for newly discovered evidence. Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894 (1939).

Cited in Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239 (1942); Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.—The award of the Commission, as provided in § 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in § 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within thirty days from the date of such award, or within thirty days after receipt of notice to be sent by registered mail of such award, but not thereafter, appeal from the decision of said Commission to the superior court of the county in which the alleged accident happened, or in which the employer resides or has his principal office, for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions: Provided the Commission shall have sixty days after receipt of notice of appeal, properly served on the opposing party and the Industrial Commission, within which to prepare and furnish to the appellant or his attorney a certified transcript of the record in the case for filing in superior court. The Commission, of its own motion, may certify questions of law to the Supreme Court, for decision and determination by the said Court. In case of an appeal from the decision of the Commission, or of a certification by said Commission of questions of law, to the Supreme Court, said appeal or certification shall operate as a supersedeas, and no employer shall be required to make payment of the award involved in said appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this article. (1929, c. 120, s. 60; 1947, c. 823.)

Cross Reference.—As to exclusiveness of remedy provided by §§ 97-83 to 97-86, see note to § 97-83.

Editor's Note.-The 1947 amendment inserted the proviso at the end of the first sentence.

Matters to Be Considered on Appeal.— While findings of fact by the Industrial Commission, when supported by competent evidence, are conclusive, the rulings of the Commission are subject to review on questions of law, whether the Industrial Commission has jurisdiction, whether the findings are supported by the evidence, and whether upon the facts established the decision is correct. Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730

An appeal from the Industrial Commission is permitted only on matters of law. Fox v. Cramerton Mills, 225 N. C. 580, 35 S. E. (2d) 869 (1945).

The jurisdiction of the superior court is limited to questions of law only. Byrd v. Gloucester Lbr. Co., 207 N. C. 253, 176 S.

E. 572 (1934).

On appeal from the Industrial Commission, the superior court has no power to review the findings of fact by the Commission. It can consider only errors of law appearing in the record, as certified by the Commission. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937).

Evidence Not Considered. — Under this section an award of the Industrial Commission is conclusive and binding as to all questions of fact when supported by sufficient, competent evidence, and neither the Supreme Court nor the superior court can consider the evidence for the purpose of determining the facts on appeal. Reed v. Lavender Bros., 206 N. C. 898, 172 S. E. 877 (1934). See Walker v. Wilkins, 212 N. C. 627, 194 S. E. 89 (1937).

The findings of fact of the Industrial Commission are conclusive on the courts when the findings are supported by any competent evidence, notwithstanding that the court, if it had been the fact-finding body, might have reached a different conclusion, the finding of facts from the evidence being the exclusive function of the Industrial Commission. McGill v. Lumberton, 218 N. C. 586, 11 S. E. (2d) 873 (1940). See Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

A finding of fact of the Industrial Commission is conclusive on appeal if supported by evidence, notwithstanding that the evidence upon the entire record might also support a contrary finding. Riddick v. Richmond Cedar Works, 227 N. C. 647, 43 S. E. (2d) 850 (1947).

The factual determinations of the Industrial Commission are conclusive on appeal to the superior court and in the Supreme Court. Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. (2d) 320 (1944).

Under this section findings of fact by the Industrial Commission, on a claim properly constituted under the Workmen's Compensation Act, are conclusive on appeal, both in the superior court and in the Supreme Court, when supported by competent evidence. Fox v. Mills, Inc., 225 N. C. 580, 35 S. E. (2d) 869 (1945).

The Industrial Commission has the exclusive duty and authority to find the facts relative to controverted claims, and its findings of fact, with the exception of jurisdictional findings, are conclusive on the courts when supported by any competent evidence. Buchanan v. State Highway, etc., Comm., 217 N. C. 173, 7 S. E. (2d) 382 (1940); Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189 (1942).

Jurisdictional Facts Not Conclusive on Appeal.—Both a proper construction of the language of this section, and well-settled principles of law, lead to the conclusion that where the jurisdiction of the Industrial

Commission to hear and consider a claim for compensation under the provisions of the Workmen's Compensation Act is challenged by an employer, on the ground that he is not subject to the provisions of the Act, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the superior court, and that said court has both the power and the duty, on the appeal of either party to the proceeding, to consider all evidence in the record, and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission. Aycock v. Cooper, 202 N. C. 500, 163 S. E. 569 (1932).

Findings Not Supported by Competent Evidence.—The findings of fact of the Industrial Commission, when supported by competent evidence, are binding upon the courts upon appeal, but findings not supported by competent evidence are not conclusive and must be set aside. Logan v. Johnson, 218 N. C. 200, 10 S. E. (2d) 653 (1940).

The rule declared by the statute and uniformly upheld by the Supreme Court that the findings of fact made by the Industrial Commission, when supported by any competent evidence, are conclusive on appeal, does not mean that the conclusions of the Commission from the evidence are in all respects unexceptionable. If those findings, involving mixed questions of law and fact, are not supported by evidence, the award cannot be upheld. Perley v. Ballenger Paving Co., 228 N. C. 479, 46 S. E. (2d) 298 (1948).

Effect of Admission of Incompetent Evidence.-Where each of the essential facts found by the Industrial Commission is supported by competent evidence, the findings are conclusive on appeal, even though some incompetent evidence was also admitted upon the hearing. Carlton v. Bernhardt-Seagle Co., 210 N. C. 655, 188 S. E. 77 (1936). See Tomlinson v. Norwood, 208 N. C. 716, 182 S. E. 659 (1935); Swink v. Carolina Asbestos Co., 210 N. C. Swiff V. Carolina Assessos Co., 210 N. C. 303, 186 S. E. 258 (1936); Porter v. Noland Co., 215 N. C. 724, 2 S. E. (2d) 853 (1939); Baxter v. Arthur Co., 216 N. C. 276, 4 S. E. (2d) 621 (1939); Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894 (1939); Stallcup v. Carolina Wood Turning Co., 217 N. C. 302, 7 S. E. (2d) 550 (1940); MacRae v. Unemployment Compensation Comm., 217 N. C. 769, 9 S. E. (2d) 595 (1940); Blevins v. Teer, 220 N. C. 135, 16 S. E. (2d) 659 (1941); Miller v. Caudle, 220 N. C. 308, 17 S. E. (2d) 487 (1941); Haynes v. Feldspar Producing Co.,

222 N. C. 163, 22 S. E. (2d) 275 (1942); Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942); Kearns v. Biltwell Chair, etc., Co., 222 N. C. 438, 23 S. E. (2d) 310 (1942); Archie v. Greene Brothers Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834 (1943).

Court Is Not Bound by Facts Found under Misapprehension of Law.—In order to implement the remedial purposes of the Workmen's Compensation Act the Industrial Commission is constituted the factfinding body, and the statute declares that the findings of the Commission shall be "conclusive and binding as to all questions of fact." But this does not mean that the conclusions of the Commission from the facts found are in all respects unexceptionable, and when facts are found by the Commission under a misapprehension of the law, the court is not bound by such findings. Cooper v. Colonial Ice Co., 230 N. C. 43, 51 S. E. (2d) 889 (1949).

Facts found by the Industrial Commission under a misapprehension of law are not binding on appeal. Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948).

Findings as to Whether Accident Arose out of and in Course of Employment .-The findings of fact by the Industrial Commission as to whether injury to an employee was by accident arising out of and in the course of his employment are conclusive on the courts upon appeal when the findings are supported by competent evidence of sufficient probative force. Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396 (1934).

When the record contains evidence to support either a finding that the accident did or did not arise out of and in the course of employment, the findings of the Industrial Commission are conclusive on appeal. Ashley v. F-W Chevrolet Co., 222 N. C. 25, 21 S. E. (2d) 834 (1942); Hegler v. Cannon Mills Co., 224 N. C. 669, 31 S. E. (2d) 918 (1944); Fox v. Cramerton Mills, 225 N. C. 580, 35 S. E. (2d) 869 (1945); DeVine v. Dave Steel Co., 227 N. C. 684, 44 S. E. (2d) 77 (1947). See also Chambers v. Union Oil Co., 199 N. C. 28. 153 S. E. 594 (1930).

Where there is evidence that the driver of the employer's oil truck habitually carried a pistol in order to protect his employer's property, and that the employer acquiesced therein, and that the plaintiff was injured while filling a fuel tank in the course of his employment by the accidental explosion of the pistol carried by the driver when the driver threw it back into his truck

after he and the plaintiff had joked about whether the pistol would shoot, the evidence discloses that the injury arose out of the employment and is sufficient to support the finding of fact by the Industrial Commission to that effect, which is conclusive and binding on appeal. Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594 (1930).

The finding of the Industrial Commission that deceased was an employee of defendant at the time of his fatal injury is conclusive on the courts if supported by competent evidence, notwithstanding that the court might have reached a different conclusion if it had been the fact-finding body. Cloninger v. Ambrosia Cake Bakery Co., 218 N. C. 26, 9 S. E. (2d) 615 (1940).

Finding as to Cause of Death.—Determination of the Industrial Commission that additional hazard created by artificial heat was the direct and superinducing cause of plaintiff's intestate's death was conclusive on appeal. Fields v. Tompkins-Johnston Plumbing Co., 224 N. C. 841, 32 S. E. (2d) 623 (1945).

The statutes regulating appeals from a justice of the peace are applicable and control in appeals from the Industrial Commission to the superior court, this section failing to provide the procedure for such appeals. Higdon v. Nantahala Power, etc., Co., 207 N. C. 39, 175 S. E. 710 (1934).

Since the Workmen's Compensation Act does not provide any specific machinery governing appeals to the superior court, resort may be had to statutes regulating appeals in analogous cases, ordinarily those regulating appeals from a justice of the peace, so far as same are reasonably applicable and consonant with the language of the statute and the legislative intent. Summerell v. Chilean Nitrate Sales Corp., 218 N. C. 451, 11 S. E. (2d) 304 (1940).

Same-Rule Refers Only to Mechanics of Appeal.-While the Workmen's Compensation Act does not set out with particularity the procedure on appeal, it has been held by the Supreme Court that by analogy that prescribed for appeals from judgments of justices of the peace, when practical, should apply; but this rule refers only to the mechanics of appeal, as to notice and docketing, for the appeal from the Industrial Commission is only on matters of law and not de novo. Fox v. Cramerton Mills, 225 N. C. 580, 35 S. E. (2d) 869

In Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937), it is said that statutory provisions with respect to appeals from judgments of justices of the peace to the superior court, where the trial must be de novo, are not controlling with respect to appeals from awards of the Industrial Commission to superior court, where only errors of law appearing in the record may be considered.

Time for Docketing Appeal.—An appellant from an award of the Industrial Commission is required to docket his appeal at the next term of the superior court, civil or criminal, beginning after the expiration of the 30 days from the award, or receipt of notice of the award by registered mail, allowed by this section for appeal, this being consonant with the legislative intent and the language of the section, and with the analogous statute requiring appeals from a justice of the peace to be taken to the next term of the superior court beginning after the expiration of the 10 days allowed for service of notice of appeal, § 7-179, and the fact that notice of appeal from the award of the Industrial Commission is given prior to a term of the superior court beginning prior to the expiration of 30 days after appellant's receipt of notice of the award by registered mail, does not vary this result, and the appeal is improperly dismissed for failure to docket same before or during such intervening term of court. Summerell v. Chilean Nitrate Sales Corp., 218 N. C. 451, 11 S. E. (2d) 304 (1940).

Time within Which Transcript of Record Must Be Filed.-In the absence of any requirement of the statute as to the time within which a transcript of the record in a proceeding before the Industrial Commission must be docketed in the superior court, when there has been an appeal from the award of the Commission, such docketing at any time before the convening of the next ensuing regular term of the superior court, or before said time has expired, is sufficient to perfect the appeal. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937). Note the effect of the 1947 amendment to this section.

Right to Reverse and Remand Cause.—Where all the facts are admitted and the Industrial Commission denies compensation on the facts as a matter of law, the superior court, on appeal, has jurisdiction, in view of this section, to reverse the Industrial Commission and remand the cause. Perkins v. Sprott, 207 N. C. 462, 177 S. E. 404 (1934).

Remand on Ground of Newly Discovered Evidence.—When a proceeding for compensation under the provisions of this Act has been duly docketed in the superior court, upon an appeal from an award of the Industrial Commission, the superior court has the power in a proper case to order a rehearing of the proceeding by the Industrial Commission on the ground of newly discovered evidence, and to that end to remand the proceeding to the Commission. Byrd v. Gloucester Lbr. Co., 207 N. C. 253, 176 S. E. 572 (1934).

Remand Where Facts Found under Misapprehension of Law.—Where it appears that the Industrial Commission has found the facts under a misapprehension of the law the cause will be remanded for findings by the Commission upon consideration of the evidence in its true legal light. McGill v. Lumberton, 215 N. C. 752, 3 S. E. (2d) 324 (1939).

Remand Where Findings Insufficient.—When the findings of the Industrial Commission are insufficient for a proper determination of the question involved, the proceeding will be remanded to the Industrial Commission for additional findings. Farmer v. Bemis Lbr. Co., 217 N. C. 158, 7 S. E. (2d) 376 (1940).

Judgment Should Refer to Specific Assignments of Error.—Where upon an appeal from the Industrial Commission the exceptions point out specific assignments of error, the judgment in the superior court thereon properly should overrule or sustain respectively each of the exceptions on matters of law thus designated. And where the judgment in the superior court merely decreed that the award be in all respects affirmed, the Supreme Court will presume that the judge below considered each of the assignments of error and overruled them. Fox v. Cramerton Mills, 225 N. C. 580, 35 S. E. (2d) 869 (1945).

Applied in Smith v. Hauser & Co., 206 N. C. 562, 174 S. E. 455 (1934); Latham v. Southern Fish, etc., Co., 208 N. C. 505, 181 S. E. 640 (1935).

Cited in Early v. Basnight & Co., 214 N. C. 103, 198 S. E. 577 (1938); Raynor v. Louisburg Com'rs, 220 N. C. 348, 17 S. E. (2d) 495 (1941); Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239 (1942); Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

§ 97-87. Agreements approved by Commission or awards may be filed as judgments; discharge or restoration of lien.—Any party in interest may file in the superior court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the Commission, or of an

order or decision of the Commission, or of an award of the Commission unappealed from or of an award of the Commission affirmed upon appeal; whereupon said court shall render judgment in accordance therewith, and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by said court: Provided, if the judgment debtor shall file a certificate duly issued by the Industrial Commission, showing compliance with § 97-93, with the clerk of the superior court in the county or counties where such judgment is docketed, then such clerk shall make upon the judgment roll an entry showing the filing of such certificate, which shall operate as a discharge of the lien of the said judgment, and no execution shall be issued thereon; provided, further, that if at any time there is default in the payment of any installment due under the award set forth in said judgment the court may, upon application for cause and after ten days' notice to judgment debtor, order the lien of such judgment restored, and execution may be immediately issued thereon for past due installments and for future installments as they may become due. (1929, c. 120, s. 61.)

Where No Appeal Taken.—The procedure for the enforcement of an award of the Industrial Commission when no appeal is taken therefrom is by filing a certified copy of the award in the superior court, whereupon said court shall render judgment in accordance therewith and notify the parties. Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239 (1942).

Mandamus to Compel County Board of Health to Pay Award.—Mandamus to compel a municipal corporation, governmental agency or public officer to pay a claim is equivalent to execution, and therefore a suit to compel a county board of health to pay an award rendered against it by the Industrial Commission from which no appeal was taken will not lie until judgment on the award has been rendered by the superior court in accordance with the procedure outlined by this section. Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239 (1942).

§ 97-88. Expenses of appeals brought by insurers.—If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this article, shall find that such hearing or proceedings were brought by the insurer, and the Commission or court by its decision orders the insurer to make, or to continue, payments of compensation to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings, including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs. (1929, c. 120, s. 62; 1931, c. 274, s. 11.)

Editor's Note.—This section was radically changed by the 1931 amendment. It formerly allowed costs in any proceeding found to have been prosecuted or defended without reasonable grounds to be thrown on the party so acting unreasonably. 9 N. C. Law Rev. 407.

C. Law Rev. 407.
 Validity.—This section is valid. Russell
 v. Western Oil Co., 206 N. C. 341, 174 S.
 E. 101 (1934).

Discretion of Court.—The power given the court under this section to order that the cost to the injured employee of such proceedings, including a reasonable attorney's fee to be determined by the Commission, shall be paid by the insurer as part of the bill of costs is within the discretion of the court, and an order appearing in the judgment will not be reviewed by the Supreme Court. Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396 (1934).

The allowance of attorneys' fees to claimant's attorneys in a proceeding under the Workmen's Compensation Act was held authorized by this section. Brooks v. Carolina Rim, etc., Co., 213 N. C. 518, 196 S. E. 835 (1938).

Applied in Williams v. Thompson, 203 N. C. 717, 166 S. E. 906 (1932).

§ 97-89. Commission may appoint qualified physician to make necessary examinations; expenses; fees.—The Commission or any member thereof may, upon the application of either party, or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of the employee, and to testify in respect thereto. Said physi-

cian or surgeon shall be allowed traveling expenses and a reasonable fee to be fixed by the Commission, not exceeding ten dollars for each examination and report, but the Commission may allow additional reasonable amounts in extraordinary cases. The fees and expenses of such physician or surgeon shall be paid by the employer. (1929, c. 120, s. 63; 1931, c. 274, s. 12.)

Editor's Note.—The 1931 amendment substituted the word "employer" for the word "State" formerly ending this section.

- § 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims.—(a) Fees for attorneys and physicians and charges of hospitals for services under this article shall be subject to the approval of the Commission; but no physician shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Industrial Commission in connection with the case.
- (b) Any person (1) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or such court, or (2) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a misdemeanor, and upon conviction thereof shall, for each offense, be punished by a fine of not more than \$500 or by imprisonment not to exceed one year, or by both such fine and imprisonment. (1929, c. 120, s. 64.)

Agreement by Employee to Pay Physician Held Void.—An agreement by an injured employee to pay the physician engaged by him any balance due on his account after application of the amount approved by the Industrial Commission for the services is unenforceable and void, since this section makes the receipt of any fee for such services not approved by the Commission a misdemeanor. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Remedy Where Physician's Bill Approved for Less than Full Amount.—Where a physician has submitted his bill to the Industrial Commission for its approval, and received approval for less than the full amount, his remedy is to request a hearing before the Commission with the

right of appeal to the courts under §§ 97-83 to 97-86, and this remedy is exclusive. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Independent Action by Physician against Employee.—Where a physician has submitted his bill to the Industrial Commission for its approval, and received approval for less than the full amount, and has failed to pursue his exclusive statutory remedy of a hearing before the Industrial Commission with the right of appeal to the courts under §§ 97-83 to 97-86, he has no standing to attack the constitutionality of this section in an independent suit against the employee to recover for the medical services. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

§ 97-91. Commission to determine all questions.—All questions arising under this article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided. (1929, c. 120, s. 65.)

Applied, as to physician's claim for medical services, in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

§ 97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.—(a) Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment on blanks approved by the Commission. Within five days after the occurrence and knowledge thereof, as provided in § 97-22, of an injury to an employee, causing his absence from work for more than one day, a report thereof shall be made

in writing and mailed to the Industrial Commission on blanks to be procured from

the Commission for this purpose.

(b) The records of the Commission, in so far as they refer to accidents, injuries, and settlements, shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them.

(c) Upon the termination of the disability of the injured employee, or if the disability extends beyond a period of sixty days, then, also, at the expiration of such period the employer shall make a supplementary report to the Commission

on blanks to be procured from the Commission for the purpose.

(d) The said report shall contain the name, nature, and location of the business of the employer, and name, age, sex, and wages and occupation of the injured employee; and shall state the date and hour of the accident causing injury, the nature and cause of the injury, and such other information as may be required by the Commission.

(e) Any employer who refuses or neglects to make the report required by this section shall be liable for a penalty of not less than five dollars and not more than twenty-five dollars for each refusal or neglect. The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. In the event the employer has transmitted the report to the insurance carrier for transmission by such insurance carrier to the Industrial Commission, the insurance carrier willfully neglecting or failing to transmit the report shall be liable for the said penalty. (1929, c. 120, s. 66; 1945, c. 766.)

Editor's Note. — The 1945 amendment substituted, in the second sentence of subsection (a), "five days" for "ten days" and "one day" for "three days."

Report as Evidence.—The report signed by the manager of an incorporated employer and filed with the Industrial Commission, as required by this section, is competent upon the hearing and statements contained therein not within the personal knowledge of the manager are competent as an admission against interest. Carlton v. Bernhardt-Seagle Co., 210 N. C. 655, 188 S. E. 77 (1936).

Report as Claim.—Where the employer

has filed a report with the Commission within the prescribed time upon verbal information elicited from the representative of the employee by its claim agent, the representative being unable to read write, and, the employer admitting liability, the report has been filed with the Industrial Commission as a claim within one year from date of the accident and contains all facts necessary to make an award. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936). See note to 8 97-24.

Applied in Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948).

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits.-Every employer who accepts the provisions of this article relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized, or shall furnish to the Industrial Commission satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due, as provided for in this article. In the latter case the Commission may require the deposit of an acceptable security, indemnity or bond to secure the payment of the compensation liabilities as they are incurred. (1929, c. 120, s. 67; 1943, c. 543.)

Editor's Note. - The 1943 amendment changed the word "ability" to "liability."

For comment on the provisions of this and other sections in relation to the law of contracts, see 13 N. C. Law Rev. 102.

Employer Primarily Liable.—An award was entered in favor of the dependents of a deceased employee for payment of compensation in weekly installments for the death of the employee. After the insurance carrier had paid several installments, it defaulted in the payment of the balance because of insolvency. Under the provisions of the Compensation Act the employer is primarily liable to the employee, which obligation is unimpaired by its contract with an insurer for insurance protection, or by the insurer's subrogation to the rights of the employer upon paving or assuming the payment of an award, and the employer is not relieved of its liability to the dependents of the deceased employee for the balance of the weekly payments because of the insolvency of the insurer. Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438 (1936).

The employer, held liable for the balance of an award after the insolvency of the insurer, is not entitled to a credit for the amount paid the dependents out of the judgment against the third-person tort-

feasor or for the amount paid plaintiff's attorneys in that action, the amount paid the dependents out of the judgment being an amount in addition to the award, and the award not being subject to reduction by such amount. Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438 (1936).

Stated in Thompson's Dependents v.

Johnson Funeral Home, 205 N. C. 801, 172

S. E. 500 (1934).

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948).

- § 97-94. Employers required to give proof within 30 days that they have complied with preceding section; fine for not keeping liability insured; review; liability for compensation.—(a) Every employer accepting the compensation provisions of this article shall, within thirty days, after this article takes effect, file with the Commission, in form prescribed by it, and thereafter, annually or as often as may be necessary, evidence of his compliance with the provisions of § 97-93 and all others relating thereto.
- (b) Any employer required to secure the payment of compensation under this article who refuses or neglects to secure such compensation shall be punished by a fine of ten cents for each employee, but not less than one dollar nor more than fifty dollars for each day of such refusal or neglect, and until the same ceases; and he shall be liable during continuance of such refusal or neglect to an employee either for compensation under this article or at law in the same manner as provided in § 97-14.

The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. (1929, c. 120, s. 68; 1945, c. 766.)

Editor's Note.—The 1945 amendment struck out the words "at the time of the insurance becoming due" formerly appearing after the word "employee" the first

time it appears in subsection (b). Quoted in Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438 (1936).

'§ 97-95. Actions against employers failing to effect insurance or qualify as self-insurer.—As to every employer subject to the provisions of this article who shall fail or neglect to keep in effect a policy of insurance against compensation liability arising hereunder with some insurance carrier, as provided in § 97-93, or who shall fail to qualify as a self-insurer as provided in the article, in addition to other penalties provided by this article, such employer shall be liable in a civil action which may be instituted by the claimant for all such compensation as may be awarded by the Industrial Commission in a proceeding properly instituted before said Commission, and such action may be brought by the claimant in the county of his residence or in any county in which the defendant has any property in this State; and in said civil action, ancillary remedies provided by law in civil actions of attachment, receivership, and other appropriate ancillary remedies shall be available to the plaintiff therein. Said action may be instituted before the award shall be made by the Industrial Commission in such case for the purpose of preventing the defendant from disposing of or removing from the State of North Carolina for the purpose of defeating the payment of compensation any property which the defendant may own in this State. In said action, after being instituted, the court may, after proper amendment to the pleadings therein, permit the recovery of a judgment against the defendant for the amount of compensation duly awarded by the North Carolina Industrial Commission, and subject any property seized in said action for payment of the judgment so awarded. The institution of said action shall in no wise interfere with the jurisdiction of said

Industrial Commission in hearing and determining the claim for compensation in full accord with the provisions of this article. Nothing in this section shall be construed to limit or abridge the rights of an employee as provided in subsection (b) of § 97-94. (1941, c. 352.)

This section affects procedure only and does not disturb any vested rights. It must be construed prospectively and not retrospectively. Byrd v. Johnson, 220 N. C. 184, 16 S. E. (2d) 843 (1941).

Attachment.—The provisions of this section, in force from its ratification on March 15, 1941, were available to claimants who instituted a civil action alleging that the Industrial Commission had awarded them compensation in a stipulated sum on March 24, 1941, that defendant employer had failed

and neglected to keep in effect a policy of compensation insurance and had failed to qualify as a self-insurer, that defendant was disposing of and removing all his property from the State, and prayed that a warrant of attachment issue against defendant's property. The warrant of attachment was issued, and defendant's exception to the refusal of the court to vacate it was held without merit. Byrd v. Johnson, 220 N. C. 184, 16 S. E. (2d) 843 (1941).

- § 97-96. Certificate of compliance with law; revocation and new certificate.—Whenever an employer has complied with the provisions of § 97-93, relating to self-insurance, the Industrial Commission shall issue to such employer a certificate, which shall remain in force for a period fixed by the Commission, but the Commission may, upon at least sixty days' notice and a hearing to the employer, revoke the certificate upon satisfactory evidence for such revocation having been presented. At any time after such revocation the Commission may grant a new certificate to the employer upon his petition. (1929, c. 120, s. 69.)
- § 97-97. Insurance policies must contain clause that notice to employer is notice to insurer, etc.—All policies insuring the payment of compensation under this article must contain a clause to the effect that, as between the employer and the insurer, the notice to or acknowledgment of the occurrence of the injury on the part of the insured employer shall be deemed notice or knowledge as the case may be, on the part of the insurer; that jurisdiction of the insured for the purposes of this article shall be jurisdiction of the insurer, that the insurer shall in all things be bound by and subject to the awards, judgments, or decrees rendered against such insured employer, and that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the insurer from the payment of compensation for disability or death sustained by an employee during the life of such policy or contract. (1929, c. 120, s. 70.)
- § 97-98. Policy must contain agreement promptly to pay benefits; continuance of obligation of insurer in event of default.—No policy of insurance against liability arising under this article shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to same all benefits conferred by this article, and all installments of the compensation that may be awarded or agreed upon, and that the obligation shall not be affected by any default of the insured after the injury or by any default in giving notice required by such policy or otherwise. Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name. (1929, c. 120, s. 71.)
- § 97-99. Law written into each insurance policy; form of policy to be approved by Insurance Commissioner; cancellation; single catastrophe hazards.—(a) Every policy for the insurance of the compensation herein provided, or against liability therefor, shall be deemed to be made subject to the provisions of this article. No corporation, association, or organization shall enter into any such policy of insurance unless its form shall have been approved by the Insurance Commissioner. No policy form shall be approved unless

the same shall provide a thirty-day prior notice of an intention to cancel same by the carrier to the insured by registered mail. This shall not apply to the expiration date shown in the policy. The carrier may cancel the policy for nonpayment of premium on ten days' written notice to the insured, and the insured may cancel the policy on ten days' written notice by registered mail to the carrier.

(b) This article shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards: Provided, that nothing herein contained shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe. (1929, c. 120, s. 72; 1945, c. 381, s. 1.)

Editor's Note.—The 1945 amendment added the last three sentences of subsection (a).

- § 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; returned or canceled premiums; reports of premiums collected; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices to carrier; employer who carries own risk shall make report on pay roll.—(a) The rates charged by all carriers of insurance, including the parties to any mutual insurance association writing insurance against the liability for compensation under this article, shall be fair, reasonable, and adequate, with due allowance for merit rating; and all risks of the same kind and degree of hazard shall be written at the same rate by the same carrier. No policy of insurance against liability for compensation under this article shall be valid until the rate thereof has been approved by the Commissioner of Insurance; nor shall any such carrier of insurance write any such policy or contract until its basic and merit rating schedules have been filed with, approved, and not subsequently disapproved by the Commissioner of Insurance.
- (b) Each such insurance carrier shall report to the Commissioner of Insurance, in accordance with such reasonable rules as the Commissioner of Insurance may at any time prescribe, for the purpose of determining the solvency of the carrier and the adequacy of its rates; for such purpose the Commissioner of Insurance may inspect the books and records of such insurance carrier, and examine its agents, officers, and directors under oath.
- (c) Every person, partnership, association, corporation, whether organized under the laws of this or any other state or country, every mutual company or association and every other insurance carrier insuring employers in this State against liability for personal injuries to their employees, or death caused thereby, under the provisions of this article, shall, as hereinafter provided, pay a tax upon the premium received, whether in cash or notes, in this State, or on account of business done in this State, for such insurance in this State, at the rate provided in the Revenue Act then in force, which tax shall be in lieu of all other taxes on such premiums, which tax shall be assessed and collected as hereinafter provided; provided, however, that such insurance carriers shall be credited with all canceled or returned premiums actually refunded during the year on such insurance.
- (d) Every such insurance carrier shall, for the six months ending December thirty-first, nineteen hundred and twenty-nine, and annually thereafter, make a return, verified by the affidavit of its president and secretary, or other chief officers or agents, to the Commissioner of Insurance, stating the amount of all such premiums and credits during the period covered by such return. Every insurance carrier required to make such return shall file the same with the Commissioner of Insurance on or before the first day of April after the close of the period covered thereby, and shall at the same time pay to the State Insurance Commissioner the tax provided in the Revenue Act then in force on such

premium ascertained, as provided in subsection (c) hereof, less returned pre-

mium on canceled policies.

(e) If any such insurance carrier shall fail or refuse to make the return required by this article, the said Commissioner of Insurance shall assess the tax against such insurance carrier at the rate herein provided for, on such amount of premium as he may deem just, and the proceedings thereon shall be the same as if the return had been made.

(f) If any such insurance carrier shall withdraw from business in this State before the tax shall fall due, as herein provided, or shall fail or neglect to pay such tax, the Commissioner of Insurance shall at once proceed to collect the same; and he is hereby empowered and authorized to employ such legal process as may be necessary for that purpose, and when so collected he shall pay the same into the State treasury. The suit may be brought by the Commissioner of Insurance, in his official capacity, in any court of this State having jurisdiction. Reasonable attorney's fees may be taxed as costs therein, and process may issue to any county of the State, and may be served as in civil actions, or in case of unincorporated associations, partnerships, interindemnity contracts, upon any agent of the parties thereto upon whom process may be served under the laws of this State.

(g) Any person or persons who shall in this State act or assume to act as agent for any such insurance carrier whose authority to do business in this State has been suspended, while such suspension remains in force, or shall neglect or refuse to comply with any of the provisions of this section obligatory upon such person or party, or who shall willfully make a false or fraudulent statement of the business or condition of any such insurance carrier, or false or fraudulent return as herein provided, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment for not less than ten nor more than ninety days, or

both such fine and imprisonment in the discretion of the court.

(h) Whenever by this article, or the terms of any policy contract, any officer is required to give any notice to an insurance carrier, the same may be given by delivery, or by mailing by registered letter properly addressed and stamped, to the principal office or general agent of such insurance carrier within this State, or to its home office, or to the secretary, general agent, or chief officer thereof in the United States, or the State Insurance Commissioner.

(i) Any insurance carrier liable to pay a tax upon premiums under this article shall not be liable to pay any other or further tax upon such premiums, under

any other law of this State.

(j) Every employer carrying his own risk under the provisions of § 97-93 shall, under oath, report to the Commission his pay roll, subject to the provisions of this article. Such report shall be made in form prescribed by the Commission, and at the times herein provided for premium reports by insurer. The Commission shall assess against such pay roll a maintenance fund tax computed by taking such per cent of the basic premiums charged against the same or most similar industry or business taken from the manual insurance rate then in force in this State as is assessed in the Revenue Act against the insurance carriers for premiums collected on compensation insurance policies. (1929, c. 120, s. 73; 1931, c. 274, s. 13; 1947, c. 574.)

Editor's Note.—The 1947 amendment substituted "annually" for "semiannually" in the first sentence of subsection (d). It also struck out the words "within thirty days" formerly appearing in the second sentence and inserted in lieu thereof the words "on or before the first day of April."

The moneys received under subsection (j) of this section is a special fund available to the Industrial Commission for its

maintenance, but comes within the statute creating the Budget Bureau, and the two statutes should be construed in pari materia, and the Budget Bureau is authorized and required to allocate to the Industrial Commission so much of the special fund created by said subsection as is necessary to carry out its function efficiently, and also allocate additional money from funds of a similar nature to the extent and

§ 97-101. Collection of fines and penalties.—The Industrial Commission shall have the power by civil action brought in its own name to enforce the collection of any fines or penalties provided by this article, and fines or penalties collected by the Commission shall become a part of the maintenance fund referred to in subsection (j) of § 97-100. (1931, c. 274, s. 14.)

ARTICLE 2.

Compensation Rating and Inspection Bureau,

§ 97-102. Compensation Rating and Inspection Bureau created; objects, functions, etc.; hearings where rates changed.—There is hereby created a bureau to be known as the Compensation Rating and Inspection Bureau of North Carolina, with the following objects, functions and sources of income:

of North Carolina, with the following objects, functions and sources of income:

(a) To maintain rules and regulations and fix premium rates for workmen's compensation insurance and equitably adjust the same as far as practicable, in accordance with the hazards of individual risks by inspection by the Bureau.

- (b) To furnish upon request of any employer in the State of North Carolina or to any member of the Compensation Rating and Inspection Bureau of North Carolina, upon whose risk a compensation rate has been promulgated, information as to the rating, including the method of its compilation, and to encourage employers to reduce the number and severity of accidents by offering reduced premium rates for improved working conditions under such uniform system of merit or schedule rating as may be approved by the Insurance Commissioner of the State of North Carolina.
- of the State of North Carolina.

 (c) The Bureau shall make a rating survey of each risk inspected which survey shall clearly show the location of all ratable items: Provided, however, that the Bureau shall not describe the items or make any recommendations for accident prevention, such service being reserved as a proper and essential field for the competitive enterprise of its individual members.

(d) The Bureau shall provide reasonable means to be approved by the Commissioner whereby any person affected by a rate made by it may be heard in person or by his authorized representative before the governing or rating committee or other proper executive of the Bureau. (1931, c. 279, s. 1; 1945, c. 381, s. 1.)

Cross Reference.—As to Automobile
Rate Administrative Office established in the Bureau created by this section, see § 58-246 et seq.

Editor's Note.—The 1945 amendment added subsection (d).

§ 97-103. Membership in Bureau of carriers of insurance; acceptance of rejected risks; rules and regulations for maintenance; Insurance Commissioner or deputy ex officio chairman.—Before the Insurance Commissioner shall grant permission to any mutual association, reciprocal or stock company, or any other insurance organization to write compensation or employers' liability insurance in this State, it shall be a requisite that they shall subscribe to and become members of the Compensation Rating and Inspection Bureau of North Carolina.

It shall be the duty of all companies underwriting workmen's compensation insurance in this State and being members of the Compensation Rating and Inspection Bureau of North Carolina, as defined in this section, to insure and accept any workmen's compensation insurance risk which shall have been tendered to and rejected by any three members of said Bureau in the manner hereinafter provided. When any such rejected risk is called to the attention of the Compensation Rating and Inspection Bureau of North Carolina and it appearing that said risk is in good faith entitled to such coverage, the Bureau shall fix the

initial premium therefor, (subject to the approval of the Insurance Commissioner), and upon its payment said Bureau shall designate a member whose duty it shall be to issue a standard workmen's compensation policy of insurance containing the usual and customary provisions found in such policies therefor. Upon receipt of the required premium at the office of the Bureau during regular working hours the Bureau shall instruct the designated carrier to issue its policy of insurance to become effective as of twelve one a. m. the following day, and the carrier shall be so bound; provided, that the carrier may request of the Bureau a certificate of the Department of Labor that the insured is complying with the laws, rules and regulations of that Department, Said certificate shall be furnished within thirty days by the Department of Labor, unless extension of time is granted by agreement between the Bureau and the Department of Labor. The Bureau shall within thirty days after March 8, 1935, make and adopt such rules as may be necessary to carry this article into effect, subject to final approval of the Insurance Commissioner. As a prerequisite to the transaction of workmen's compensation insurance in this State every member of said Bureau shall file with the Insurance Commissioner written authority permitting said Bureau to act in its behalf as provided in this section, and an agreement to accept such risks as are assigned to said insurance by said Bureau, as provided in this section.

(a) Each member of the Compensation Rating and Inspection Bureau writing compensation insurance in the State of North Carolina shall, as a requisite thereto, be represented in the aforesaid Bureau and shall be entitled to one representative and one vote in the administration of the affairs of the Bureau. They shall, upon organization, elect a governing committee, which governing committee shall be composed of equal representation by participating and nonparticipating members.

(b) The Bureau, when created, shall adopt such rules and regulations for its procedure as may be necessary for its maintenance and operation.

No such rules or regulations shall discriminate against any type of insurer because of its plan of operation, nor shall any insurer be prevented from returning any unused or unabsorbed premium, deposit, savings or earnings to its policyholders or subscribers. The expense of such Bureau shall be borne by its members by quarterly contributions to be made in advance, such necessary expense to be advanced by prorating such expense among the members in accordance with the amount of gross workmen's compensation premiums written in North Carolina during the preceding year ending December the thirty-first, one thousand nine hundred and thirty, and members entering since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the Bureau the necessary expenses of the Bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee.

(c) The Insurance Commissioner of the State of North Carolina, or such deputy as he may appoint, shall be ex officio chairman of the Compensation Rating and Inspection Bureau of North Carolina, and the Insurance Commissioner or such deputy designated by him shall preside over all meetings of the governing committee or other meetings of the Bureau and it shall be his duty to determine any controversy that may arise by reason of a tie vote between the members of the governing committee. (1931, c. 279, s. 2; 1935, c. 76; 1945, c. 381, s. 1.)

Editor's Note.—The 1935 amendment risk shall, if demanded, furnish the Bureau a certificate of the division of standards peared prior to the 1945 amendment.

The 1945 amendment inserted the third and fourth sentences in the second paragraph in lieu of a sentence which read "Before any such risk shall be assigned under the provisions of this section such risk shall, if demanded, furnish the Bureau a certificate of the division of standards and inspection of the Department of Labor that he is complying with the rules and regulations of that Department." The amendment also inserted the second sentence of subsection (b).

- § 97-104. Governing committee; production of books and records for compilation of appropriate statistics; rates subject to approval of Insurance Commissioner.—In order to carry into effect the objects of this article the Bureau members shall immediately elect its governing committee who shall employ and fix the salaries of such personnel and assistance as is necessary, subject to the approval of the Insurance Commissioner, and the Insurance Commissioner is hereby authorized to compel the production of books, data, papers, and records relating to or bearing upon such data as is necessary to compile statistics for the purpose of determining the pure cost and expense loading of workmen's compensation insurance in North Carolina and this information shall be available and for the use of the Compensation Rating and Inspection Bureau, for the compilation and promulgation of rates on workmen's compensation insurance. All such rates compiled and promulgated by such Bureau shall be submitted to the Insurance Commissioner for approval as provided in § 97-100. (1931, c. 279, s. 3.)
- § 97-104.1. Commissioner can order adjustment of rates and modification of procedure.—Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive. inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the Bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest. (1945, c. 381, s. 1.)
- § 97-104.2. General provisions.—No insurer subject to this article shall enter into any agreement for the purpose of making or establishing rates except in accordance with the provisions hereof. No member of the Bureau shall charge or receive any rate which deviates from the rates, rating plans, classifications, schedules, rules and standards made and filed by the Bureau. No insurer and no agent or other representative of any insurer and no insurance broker shall knowingly charge, demand or receive a rate or premiums which deviate from the rates, rating plans, classifications, schedules, rules and standards, made and last filed by or on behalf of the insurer, or issue or make any policy or contract involving a violation of such rate filings. (1945, c. 381, s. 1.)
- 97-104.3. Commissioner can revoke license for violations.—If the Commissioner shall find, after due notice and hearing that any insurer, officer, agent or representative thereof has violated any of the provisions of this article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 381, s. 1.)
- 97-104.4. Violation a misdemeanor.—Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars. (1945, c. 381, s. 1.)
- § 97-104.5. Appeal from decision of Commissioner.—A review of any order made by the Commissioner in accordance with the provisions of this article, shall be by appeal to the superior court of Wake County in accordance with the provisions of § 58-9.3. (1945, c. 381, s. 1.)
- § 97-104.6. Appeals from Bureau to Commissioner.—Any member of the Bureau may appeal to the Commissioner from any decision of such

Bureau and the Commissioner shall, after a hearing held on not less than ten days' written notice to the appellant and the Bureau, issue an order approving the decision of the Bureau or directing it to give further consideration to such proposal. In the event the Bureau fails to take satisfactory action, the Commissioner shall make such order as he may see fit. (1945, c. 381, s. 1.)

ARTICLE 3.

Security Funds.

§ 97-105. Title of article.—This article shall be known as the Workmen's Compensation Security Fund Act. (1935, c. 228, s. 1.)

§ 97-106. Definitions.—As hereafter used in this article, unless the context or subject matter otherwise requires:

"Stock fund" means the Stock Workmen's Compensation Security Fund

created by this article.

"Mutual fund" means the Mutual Workmen's Compensation Security Fund created by this article.

"Funds" means the stock fund and the mutual fund.

"Fund" means either the stock fund or the mutual fund as the context may

"Fund year" means the calendar year.

"Stock carrier" means any stock corporation authorized to transact the business of workmen's compensation insurance in this State, except an insolvent stock carrier.

"Mutual carrier" means any mutual corporation or association and any reciprocal or interinsurance exchange authorized to transact the business of workmen's compensation insurance in this State, except an insolvent mutual carrier.

"Carrier" means either a stock carrier or a mutual carrier, as the context may

require.

"Insolvent stock carrier" or "insolvent mutual carrier" means a stock carrier or a mutual carrier, as the case may be, which has been determined to be insolvent, or for which or for the assets of which a receiver has been appointed by a court or public officer of competent jurisdiction and authority.

"Commissioner" means the Insurance Commissioner of this State.
"Workmen's Compensation Act" means the Workmen's Compensation Act of the State of North Carolina, being §§ 97-1 to 97-101 as amended and supplemented. (1935, c. 228, s. 2; 1941, c. 298, s. 1.)

Editor's Note.—The 1941 amendment in- interinsurance exchange" in the paragraph serted the words "and any reciprocal or defining "mutual carrier."

§ 97-107. Stock Workmen's Compensation Security Fund created. -There is hereby created a fund to be known as "The Stock Workmen's Compensation Security Fund," for the purpose of assuring to persons entitled thereto the compensation provided by the Workmen's Compensation Act for employments insured in insolvent stock carriers. Such fund shall be applicable to the payment of valid claims for compensation or death benefits heretofore or hereafter made pursuant to the Workmen's Compensation Act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this article, of an insolvent stock carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by stock carriers, as herein defined, all property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the Commissioner of this State in accordance with the provisions of this article. (1935, c. 228, s. 3.)

- § 97-108. Verified report of premiums to be filed by stock carrier. —Every stock carrier shall, on or before the first day of September, nineteen hundred and thirty-five, file with the Treasurer of the State and with the Commissioner identical returns, under oath, on a form to be prescribed and furnished by the Commissioner, stating the amount of net written premiums for the six months' period ending June thirtieth, nineteen hundred thirty-five on policies issued, renewed or extended by such carrier, to insure payment of compensation pursuant to the Workmen's Compensation Act. For the purposes of this article "net written premiums" shall mean gross written premiums less return premiums on policies returned not taken, and on policies canceled. Thereafter, on or before the first day of March and September of each year, each such carrier shall file similar identical returns, stating the amount of such net written premiums for the six months' period ending, respectively, on the preceding December thirty-first and June thirtieth, on policies issued, renewed or extended by such carrier. (1935, c. 228, s. 4.)
- § 97-109. Contributions by stock carriers of 1% of net written premiums.—For the privilege of carrying on the business of workmen's compensation insurance in this State, every stock carrier shall pay into the stock fund on the first day of September, nineteen hundred thirty-five, a sum equal to one per centum (1%) of its net written premiums as shown by the return hereinbefore prescribed for the period ending June thirtieth, nineteen hundred thirty-five, and thereafter each such stock carrier, upon filing each semiannual return, shall pay a sum equal to one per centum (1%) of its net written premiums for the period covered by such return. (1935, c. 228, s. 5.)
- § 97-110. Contributions to stop when stock fund equals 5% of loss reserves; resumption of contributions.—When the aggregate amount of all such payments into the stock fund, together with accumulated interest thereon, less all its expenditures and known liabilities, becomes equal to five per centum (5%) of the loss reserves of all stock carriers for the payment of benefits under the Workmen's Compensation Act as of December thirty-first, next preceding, no further contributions to said fund shall be required to be made; provided, however, that whenever, thereafter, the amount of said fund shall be reduced below five per centum (5%) of such loss reserves as of said date by reason of payments from and known liabilities of said stock fund, then such contribution to said fund shall be resumed forthwith, and shall continue until said fund, over and above its known liabilities, shall be equal to five per centum (5%) of such reserves. (1935, c. 228, s. 6.)
- § 97-111. Rules and regulations for administration of stock fund; examination of books and records; penalty for failure to file report or pay assessment; revocation of license.—The Commissioner may adopt, amend and enforce rules and regulations necessary for the proper administration of said stock fund. In the event any stock carrier shall fail to file any return or make any payment required by this article, or in case the Commissioner shall have cause to believe that any return or other statement filed is false or inaccurate in any particular, or that any payment made is incorrect, he shall have full authority to examine all the books and records of the carrier for the purpose of ascertaining the facts and shall determine the correct amount to be paid and may proceed in any court of competent jurisdiction to recover for the benefit of the fund any sums shown to be due upon such examination and determination. Any stock carrier which fails to make any statement as required by this article, or to pay any contribution to the stock fund when due, shall thereby forfeit to said fund a penalty of five per centum (5%) of the amount of unpaid contribution determined to be due as provided by this article plus one per centum (1%) of such amount for each month of delay, or fraction thereof, after the expiration of the first month of such delay, but the Commissioner may upon good cause shown

extend the time for filing of such return or payment. The Commissioner shall revoke the certificate of authority to do business in this State of any carrier which shall fail to comply with the provisions of this article or to pay any penalty imposed in accordance with this acticle. (1935, c. 228, s. 7.)

- § 97-112. Separation of stock fund; disbursements; investment; sale of securities.—The stock fund created by this article shall be separate and apart from any other fund so created and from all other State moneys. The State Treasurer shall be the custodian of said fund; and all disbursements from said fund shall be made by the State Treasurer upon vouchers signed by the Commissioner as hereinafter provided. The moneys of said fund may be invested by the State Treasurer only in the bonds or securities which are the direct obligations of or which are guaranteed as to principal and interest by the United States or this State. The State Treasurer may sell any of the securities in which said fund is invested, if advisable for its proper administration or in the best interests of such fund, and all earnings from the investments of such fund shall be credited to such fund. (1935, c. 228, s. 8.)
- § 97-113. Payment of claim from stock fund when carrier insolvent; subrogation of employer paying claim; recovery against employer or receiver of insolvent carrier.—A. A valid claim for compensation or death benefits, or installments thereof, heretofore or hereafter made pursuant to the Workmen's Compensation Act, which has remained or shall remain due and unpaid for sixty days, by reason of default by an insolvent stock carrier, shall be paid from the stock fund in the manner provided in this section. Any person in interest may file with the Commissioner an application for payment of compensation or death benefits from the stock fund on a form prescribed and furnished by the Commissioner. If there has been an award, final or otherwise, a certified copy thereof shall accompany the application. The Commissioner shall thereupon certify to the State Treasurer such award for payment according to the terms of the same, whereupon payment shall be made by the State Treasurer.

B. Payment of compensation from the stock fund shall give the fund no

right of recovery against the employer.

C. An employer may pay such award or part thereof in advance of payment from the stock fund and shall thereupon be subrogated to the rights of the employee or other party in interest against such fund to the extent of the amount

so paid.

- D. The State Treasurer as custodian of the stock fund shall be entitled to recover the sum of all liabilities of such insolvent carrier assumed by such fund from such carrier, its receiver, liquidator, rehabilitator or trustee in bankruptcy and may prosecute an action or other proceedings therefor. All moneys recovered in any such action or proceedings shall forthwith be placed to the credit of the stock fund by the State Treasurer to reimburse the stock fund to the extent of the moneys so recovered and paid, (1935, c. 228, s. 9.)
- § 97-114. Mutual Workmen's Compensation Security Fund created.—There is hereby created a fund to be known as "The Mutual Workmen's Compensation Security Fund," for the purpose of assuring to persons entitled thereto the compensation provided by the Workmen's Compensation Act for employments insured in insolvent mutual carriers. Such fund shall be applicable to the payment of valid claims for compensation or death benefits heretofore or hereafter made pursuant to the Workmen's Compensation Act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this article, of an insolvent mutual carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by mutual carriers, as herein defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys de-

posited or invested as herein provided. The fund shall be administered by the Commissioner in accordance with the provisions of this article. (1935, c. 228, s. 10.)

§ 97-115. Verified report of premiums to be filed by mutual carrier; equalization of payments by reciprocal or interinsurance exchanges.—Every mutual carrier shall, on or before the first day of September, nineteen hundred thirty-five, file with the Treasurer of the State and with the Commissioner identical returns, under oath, on a form to be prescribed and furnished by the Commissioner of Insurance, stating the amount of net written premiums for the six months' period ending June thirtieth, nineteen hundred thirty-five, on policies issued, renewed or extended by such carrier, to insure payment of compensation pursuant to the Workmen's Compensation Act during said period. For the purpose of this article "net written premiums" shall mean gross written premiums less return premiums on policies returned not taken and on policies canceled. Thereafter, on or before the first day of March and September, of each year, each such carrier shall file similar identical returns, stating the amount of such net written premiums for the six months' periods ending, respectively, on the preceding December thirty-first and June thirtieth, on such policies issued, renewed or extended by such carrier.

Any reciprocal or interinsurance exchange writing workmen's compensation insurance in North Carolina on September first, one thousand nine hundred and thirty-five and continuing to underwrite this class of insurance shall, upon the fund reaching its maximum contribution and the discontinuance of any collection thereof, continue to pay into said mutual fund as provided in this section for a period of six years after the other members of the mutual fund have discontinued said payments in order to equalize the contribution of all members of the mutual fund, and thereafter such reciprocal or interinsurance exchanges shall be subject to the provisions of this section. (1935, c. 228, s. 11; 1941, c. 298,

s. 2.)

Editor's Note.—The 1941 amendment added the second paragraph.

- § 97-116. Contributions by mutual carriers of 1% of net written premiums.—For the privilege of carrying on the business of workmen's compensation insurance in this State, every mutual carrier shall pay into the mutual fund on the first day of September, nineteen hundred thirty-five, a sum equal to one per centum (1%) of its net written premiums, as shown by the return hereinbefore prescribed for the period ending June thirtieth, nineteen hundred thirty-five, and thereafter each such mutual carrier, upon filing each semiannual return, shall pay a sum equal to one per centum (1%) of its net written premiums, as shown for the period covered by such return. (1935, c. 228, s. 12.)
- § 97-117. Distribution of excess when mutual fund exceeds 5% of loss reserves; distribution of fund when liabilities liquidated.—Whenever the mutual fund, less all its known liabilities, shall exceed five percentum (5%) of the loss reserves of all mutual carriers for the payments of losses under the Workmen's Compensation Act, as of December thirty-first next preceding, distribution of such excess shall be made as repayments for successive fund years, commencing with the first fund year, to the mutual carriers in the proportion in which they respectively made contributions for such fund year: Provided, however, no such distribution shall reduce the fund, less all its known liabilities, below an amount equal to five per centum (5%) of such loss reserves as of said date. Such repayments shall be made from time to time until the mutual carriers for the first fund year shall have received their proportionate shares of the contributions for the first fund year including interest, if any. Such repayments for succeeding fund years in their order shall be made on the same basis. The insolvency of any mutual carrier shall automatically terminate its right to

such repayments and the withdrawal of any mutual carrier from the transaction of workmen's compensation insurance business in this State shall automatically suspend its right to such repayments until all its liabilities for workmen's compensation losses in this State shall have been fully liquidated. If and when all liabilities of all mutual carriers for workmen's compensation losses in this State shall have been fully liquidated, distribution shall be made of the remaining balance of the mutual fund in the proportion in which each such mutual carrier made contributions to the mutual fund. (1935, c. 228, s. 13.)

- § 97-118. Administration, custody, etc., of mutual fund.—The provisions of §§ 97-111, 97-112, and 97-113 shall apply to the administration, custody and investment of and payments from the mutual fund and to this end those sections shall be read with the necessary changes in detail to adopt their provisions to mutual funds. (1935, c. 228, s. 14.)
- § 97-119. Notice of insolvency; report of claims and unpaid awards.—Forthwith upon any carrier becoming an insolvent stock carrier, or an insolvent mutual carrier, as the case may be, the Commissioner shall so notify the North Carolina Industrial Commission, and the North Carolina Industrial Commission shall immediately advise the Commissioner (a) of all claims for compensation pending or thereafter made against an employer insured by such insolvent carrier, or against such insolvent carrier; (b) of all unpaid or continuing agreements, awards or decisions made upon claims prior to or after the date of such notice from the Commissioner; and (c) of all appeals from or applications for modifications or rescission or review of such agreements, awards or decisions. (1935, c. 228, s. 15.)
- § 97-120. Right of Commissioner to defend claims against insolvent carriers; arrangement with other carriers to pay claims.—The Commissioner or his duly authorized representative may investigate and may defend before the North Carolina Industrial Commission or any court any or all claims for compensation against an employer insured by an insolvent carrier or against such insolvent carrier and may prosecute any pending appeal or may appeal from or make application for modification or rescission or review of an agreement, award or decision against such employer or insolvent carrier. Until all such claims for compensation are closed and all such awards thereon are paid, the Commissioner, the administrator of the funds, shall be a party in interest in respect to all such claims, agreements and awards. For the purposes of this article the Commissioner shall have exclusive power to select and employ such counsel, clerks and assistants as may be deemed necessary and to fix and determine their powers and duties, and he may also, in his discretion, arrange with any carrier or carriers to investigate and defend any or all such claims and to liquidate and pay such as are valid and the Commissioner may from time to time reimburse, from the appropriate fund, such carrier or carriers for compensation payments so made, together with reasonable allowance for the services so rendered. (1935, c. 228, s. 16.)
- § 97-121. Expenses of administering funds.—The expense of administering the stock fund shall be paid out of the stock fund and the expense of administering the mutual fund shall be paid out of the mutual fund. The Commissioner shall serve as administrator of each fund without additional compensation, but may be allowed and paid from either fund expenses incurred in the performance of his duties in connection with that fund. The compensation of those persons employed by the Commissioner shall be deemed administration expenses payable from the fund in the manner provided in § 97-112. The Commissioner shall include in his regular report to the legislature a statement of the expense of administering each of such funds for the preceding year. (1935, c. 228, s. 17.)

§ 97-122. Contributions relieving carrier of posting bond or making special deposit.—Contributions made by any stock or mutual carrier to the funds created by this article shall relieve such carriers from filing any surety bond or making any deposit of securities required under the provisions of any law of this State for the purpose of securing the payment of workmen's compensation benefits only. (1935, c. 228, s. 18.)



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Chapter 98.

Burnt and Lost Records.

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98-20. Expenses borne by applicant.

§ 98-1. Copy of destroyed record as evidence; may be recorded.—When the office of any registry is destroyed by fire or other accident, and the records and other papers thereof are burnt or destroyed, the copies of all such proceedings, instruments and papers as are of record or registry, certified by the proper officer, though without the seal of office, shall be received in evidence whenever the original or duly certified exemplifications would be. Such copies, when the court is satisfied of their genuineness, may be ordered to be recorded or registered. (1865-6, c. 41, ss. 1, 2; Code, s. 55; Rev., s. 327; C. S., s. 365.)

Admissibility of Parol Evidence.—Chapter 11 of the Revisal (§§ 98-1 to 98-18) is an enabling act and does not exclude oral evidence, admissible at common law, to prove the contents of a lost deed or record. Hughes v. Pritchard, 153 N. C. 23, 63 S. E. 906 (1910). See Mobley v. Watts, 98 N. C. 284, 3 S. E. 677 (1887); Varner v. Johnston, 112 N. C. 570, 17 S. E. 483 (1893).

When a deed is lost or destroyed a copy must be produced if there be one, but if there is none, parol evidence may be admitted to prove its contents. Baker v. Webb, 2 N. C. 43 (1794); Dumas v. Powell, 14 N. C. 103 (1831); Cowles v. Hardin, 91 N. C. 233 (1884).

Same—Not Admissible to Change Certified Copy.—This section does not permit parol evidence to be introduced to show that the lost or destroyed original had a different description and thus correct a recorded certified copy of a deed. Hopper v. Justice, 111 N. C. 420, 16 S. E. 626 (1892).

§ 98-2. Originals may be again recorded.—All original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the court shall require. (1865-6, c. 41, s. 3; Code, s. 56; Rev., s. 328; C. S., s. 366.)

Action to Establish Lost Deed Lies as Section Is Not Exclusive.—In an action to establish a lost deed, the record of which was also destroyed, a motion to dismiss upon the ground that the action should have been brought under § 56 of the Code (now this section) was properly refused, as the section is an enabling act giving an additional, but not an exclusive, remedy. Jones v. Ballou, 139 N. C. 526, 52 S. E. 254 (1905).

Jurisdiction in the superior court was sustained in McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971 (1892), and was tacitly recognized in Tuttle v. Rainey, 98 N. C. 513, 4 S. E. 475 (1887). In Cowles v. Hardin, 91 N. C. 231 (1884); Mobley v. Watts, 98 N. C. 284, 3 S. E. 677 (1887), and Hopper v. Justice, 111 N. C. 420, 16 S. E. 626 (1892), it was held that a party whose deed with its registration had been destroyed instead of having it set up and

recorded could depend upon the rules of the common law to establish its contents whenever an occasion might arise, as in the course of a trial. Cowles v. Hardin, 79 N. C. 577 (1878), simply holds that when the proceeding is brought by virtue of § 56 of the Code (now this section), its requirements must be complied with. Jones v. Ballou, 139 N. C. 526, 52 S. E. 254 (1950).

Original Recorded by Clerk upon Sufficient Evidence.—Where the registry of partition is destroyed and a paper purporting to be the original is presented to the clerk, it is his duty, after satisfying himself upon evidence that the paper is the

original one, to record it. Hill v. Lane, 149 N. C. 267, 62 S. E. 1067 (1908).

Effect of Failure to Again Register.—"This statutory provision, at least, admonished all persons having such original papers to prove and register them anew in the way prescribed, and good faith required that they should do so. It, moreover, gave the public reason to expect that it would be faithfully observed by persons interested." Waters v. Crabtree, 105 N. C. 394, 402, 11 S. E. 240 (1890), holding that where the plaintiff has been negligent in again registering or recording an original deed, such reregistration will not defeat the rights of bona fide purchasers.

§ 98-3. Establishing boundaries and interest, where conveyance and copy lost.—When any conveyance of real estate, or of any right or interest therein, is lost, the registry thereof being also destroyed, any person claiming under the same may cause the boundaries thereof to be established in the manner provided in the chapter entitled Boundaries, or he may proceed in the following manner to establish both the boundaries and the nature of his estate:

He shall file his petition before the clerk of the superior court, setting forth the whole substance of the conveyance as truly and specifically as he can, the location and boundaries of his land, whose land it adjoins, the estate claimed therein, and a prayer to have his own boundaries established and the nature of his estate declared.

All persons claiming any estate in the premises, and those whose lands adjoin, shall be notified of the proceedings. Unless they or some of them, by answer on oath, deny the truth of all or some of the matters alleged, the clerk shall order a surveyor to run and designate the boundaries of the petitioner's land, and return his survey, with a plot thereof, to the court. This, when confirmed, shall, with the declaration of the court as to the nature of the estate of the petitioner, be registered and have, as to the persons notified, the effect of a deed for the same, executed by the person possessed of the same next before the petitioner. But in all cases, however, wherein the process of surveying is disputed, and the surveyor is forbidden to proceed by any person interested, the same proceedings shall be had as under the chapter entitled Boundaries.

If any of the persons notified deny by answer the truth of the conveyance, the clerk shall transfer the issues of fact to the superior court at term, to be tried as other issues of fact are required by law to be tried; and on the verdict and the pleadings the judge shall adjudge the rights of the parties, and declare the contents of the deed, if any deed is found by the jury, and allow the registration of such judgment and declaration, which shall have the force and effect of a deed. (1865-6, c. 41, s. 3; Code, s. 56; Rev., s. 328; C. S., s. 367.)

Cross Reference.—As to boundaries, see chapter 38.

Remedy Additional and Not Exclusive.

This section is an enabling statute providing, not an exclusive remedy, but merely an additional one. Mobley v. Watts, 98 N. C. 284, 3 S. E. 677 (1887); Jones v. Ballou, 139 N. C. 526, 52 S. E. 254 (1905).

It does not repeal but aids the commonlaw rules for establishing deeds, and a party may choose either mode. Cowles v. Hardin, 91 N. C. 231 (1884).

Evidence Must Show Existence, Nature

and Loss.—Before the deed can be made, the plaintiff must clearly prove that a deed did exist, its legal operation, and the loss thereof. Plummer v. Baskerville, 36 N. C. 252 (1840); Loftin v. Loftin, 96 N. C. 94, 1 S. E. 837 (1887).

Judgment Has Only Force of Original.

—A judgment under this section has only such force as the original conveyance would have as evidence had it not been destroyed. McNeely v. Laxton, 149 N. C. 327, 63 S. E. 278 (1908).

Private Acts.—In a special proceeding

under a private act, similar to this section, to restore certain records lost by fire or other casualty, it is necessary to conform

exactly to all the terms prescribed by the statute. Cowles v. Hardin, 79 N. C. 577 (1878).

§ 98-4. Copy of lost will may be probated.—In counties where the original wills on file in the office of the clerk of superior court, and will-books containing copies, are lost or destroyed, if the executor or any other person has preserved a copy of a will (the original being so lost or destroyed) with a certificate appended, signed by a clerk of the court in whose office the will was, or is required to be filed, stating that said copy is a correct one, this copy may be admitted to probate, under the same rules and in the same manner as now prescribed by law for proving wills. The proceedings in such cases shall be the same as though such copy was the original offered for the first time for probate, except that the clerk who signed such certificate shall, on oath, acknowledge his signature, or in case it appears that he has died or left the State, then his signature shall be proved by a competent witness; and the witness or witnesses to the original, who may be examined, shall be required to swear that he or they signed in the presence of the testator and by his direction a paper-writing purporting to be his last will and testament. (1868-69, c. 160, s. 1; Code, s. 57; Rev., s. 329; C. S., s. 368.)

Cross Reference.—As to probate of wills

generally, see § 31-12 et seq.

Probate before Clerk.—The probate of a lost will must be made before the clerk of the superior court, he alone having jurisdiction. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971 (1892).

Statute of Limitation Does Not Apply.—The statute of limitation does not apply to the simple taking probate of a will, hence it has no application to proceedings under this section. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971 (1892).

- § 98-5. Copy of lost will as evidence; letters to issue.—In any action or proceeding at law, where it becomes necessary to introduce such will to establish title, or for any other purpose, a copy of the will and of the record of the probate, with a certificate signed by the clerk of the superior court for the county where the will may be recorded, stating that said record and copy are full and correct, shall be admitted as competent evidence; and when a copy of a will is admitted to probate, the clerk shall thereupon issue letters testamentary. (1868-69, c. 160, s. 2; Code, s. 58; Rev., s. 330; C. S., s. 369.)
- § 98-6. Establishing contents of will, where original and copy destroyed.—Any person desirous of establishing the contents of a will destroyed as aforesaid, there being no copy thereof, may file his petition in the office of the clerk of the superior court, setting forth the entire contents thereof, according to the best of his knowledge, information and belief. All persons having an interest under the same shall be made parties, and if the truth of such petition is denied, the issues of fact shall be transferred to the superior court at term for trial by a jury, whether the will was recorded, and if so recorded, the contents thereof, and the declarations of the judge shall be recorded as the will of the testator. Any devisee or legatee is a competent witness as to the contents of every part of said will, except such as may concern his own interest in the same. (1865-6, c. 41, s. 4; Code, s. 59; Rev., s. 331; C. S., s. 370.)

Parol Evidence.—Parol evidence may be introduced to show the contents of a will which has been lost or destroyed. Cox v. Lumber Co., 124 N. C. 78, 32 S. E. 381 (1899). See Varner v. Johnston, 112 N. C.

570, 17 S. E. 483 (1893).

And such evidence is also admissible to show existence of such a will, its probate and registration. Cox v. Lumber Co., 124 N. C. 78, 32 S. E. 381 (1899).

§ 98-7. Perpetuating destroyed judgments and proceedings.—Every person desirous of perpetuating the contents of destroyed judgments, orders or proceedings of court, or any paper admitted to record or registration, or directed to be filed for safekeeping, other than wills or conveyances of real estate, or some right or interest therein, or any deed or other instrument of writing, required to

be recorded or registered, but not having been recorded or registered, it being competent to register or record said deed or other instrument at the time of its loss or destruction, may file his petition in the court having jurisdiction of like matters with the original proceeding, setting forth the substance of the whole record, deed, proceeding, or paper, which he desires to perpetuate. If, on the hearing, the court shall declare the existence of such record, deed, or proceeding, or paper at the time of the burning of the office wherein the same was lodged or kept, or other destruction thereof, and that the same was there destroyed, and shall declare the contents thereof, such declaration shall be recorded or registered, or filed, according to the nature of the paper destroyed. (1865-6, c. 41, s. 5; Code, s. 60; Rev., s. 332; C. S., s. 371.)

Restored Record Free from Collateral Attack.—Where the destroyed record has been restored, the record so restored can-

not be collaterally attacked. Branch v. Griffin, 99 N. C. 173, 5 S. E. 393 (1888).

§ 98-8. Color of title under destroyed instrument.—Every person who has been in the continual, peaceable and quiet possession of land, tenements, or hereditaments, situated in the county, claiming, using and occupying them as his own, for the space of seven years, under known boundaries, the title thereto being out of the State, is deemed to have been lawfully possessed, under color of title, of such estate therein as has been claimed by him during his possession, although he may exhibit no conveyance therefor: Provided, that such possession commenced before the destruction of the registry office, or other destruction as aforesaid, and also that any such person, or any person claiming by, through or under him, makes affidavit and produces such proof as is satisfactory to the court that the possession was rightfully taken; and if taken under a written conveyance, that the registry thereof was destroyed by fire or other means, or was destroyed before registry as aforesaid, and that neither the original nor any copy thereof is in existence: Provided further, that such presumption shall not arise against infants, persons of nonsane memory, and persons residing out of the State, who were such at the time of possession taken, and were not therefore barred, nor were so barred at the time of the burning of the office or other destruction. (1865-6, c. 41, s. 6; Code, s. 61; Rev., s. 333; C. S., s. 372.)

Cross Reference.—As to title by adverse possession generally, see § 1-35 et seq.

Adverse Possession — Presumption of Grant.—In an action to recover land under this section, the plaintiff showed title out of the State by a thirty years' possession. It was held that this statute did not make

it necessary to show seven years' adverse possession in addition to the thirty years. The lapse of seven years' adverse possession concurrently with the thirty years is sufficient. Hill v. Overton, 81 N. C. 393 (1879).

§ 98-9. Action on destroyed bond.—Actions on official or other bonds lodged in any office which are destroyed with the registry thereof may be prosecuted by petition against the principal and sureties thereto, and the proceedings shall be as in the former courts of equity. (1865-6, c. 41, s. 7; Code, s. 62; Rev., s. 334; C. S., s. 373.)

Nature of Proceedings Is Equitable.— section is equitable. McCormick v. Jerni-The nature of the proceedings under this gan, 110 N. C. 406, 14 S. E. 971 (1892).

- § 98-10. Destroyed witness tickets; duplicates may be filed.—The court having jurisdiction of the action may allow other witness tickets to be filed in place of such as may be destroyed, upon the oath of the witness or other satisfactory proof. (1865-6, c. 41, s. 8; Code, s. 63; Rev., s. 335; C. S., s. 374.)
- § 98-11. Replacing lost official conveyances.—Where any conveyance executed by any person, sheriff, clerk and master, or commissioner of court has been lost, and registry thereof destroyed as aforesaid, and there is no copy thereof, such persons, whether in or out of office, may execute another of like tenor and date, reciting therein that the same is a duplicate, and such deed shall be evidence

of the facts therein recited, in all cases wherein the parties thereto are dead, or are incompetent witnesses to prove the same, to the extent as if it was the original conveyance. (1865-6, c. 41, s. 9; Code, s. 64; Rev., s. 336; C. S., s. 375.)

§ 98-12. Court records as proof of destroyed instruments set out therein.—The records of any court in or out of the State, and all transcripts of such records, and the exhibits filed therewith in any case, are admissible to prove the existence and contents of all deeds, wills, conveyances, depositions and other papers, copies whereof are therein set forth or exhibited, in all cases where the records and registry of such as were or ought to have been recorded and registered, or the originals of such as were not proper to be recorded or registered, have been destroyed as aforesaid, although such transcripts or exhibits have been informally certified; and when offered in evidence have the like effect as though the transcript or record was the record of the court whose records are destroyed, and the deeds, wills and conveyances, depositions and other papers therein copied or therewith exhibited were original. (1865-6, c. 41, s. 10; Code, s. 65; Rev., s. 337; C. S., s. 376.)

Evidence of Court Records as Proof.— When papers have been lost and, under competent evidence and instructions, the jury has found their contents to be as con-

tended by the plaintiff, the plaintiff prevails. Fain v. Gaddis, 144 N. C. 765, 57 S. E. 1111 (1907).

- § 98-13. Copies contained in court records may be recorded.— The copies aforesaid of all such deeds, wills, conveyances and other instruments proper to be recorded or registered, as are mentioned in § 98-12, may be recorded or registered on application to the clerk of the superior court and due proof that the original thereof was genuine. (1865-6, c. 41, s. 11; Code, s. 66; Rev., s. 338; C. S., s. 377.)
- § 98-14. Rules for petitions and motions.—The following rules shall be observed in petitions and motions under this chapter:
- 1. The facts stated in every petition or motion shall be verified by affidavit of the petitioner that they are true according to the best of his knowledge, information, and belief.
- 2. The instrument or paper sought to be established by any petition shall be fully set forth in its substance, and its precise language shall be stated when the same is remembered.
- 3. All persons interested in the prayers of the petition or decree shall be made parties.
- 4. Petitions to establish a record of any court shall be filed at term in the superior court of the county where the record is sought to be established. Other petitions may be filed in the office of the clerk.
 - 5. The costs shall be paid as the court may decree.
- 6. Appeals shall be allowed as in all other cases, and where the error alleged shall be a finding by the superior court at term, of a matter of fact, the same may be removed on appeal to the Supreme Court, and the proper judgments directed to be entered below.
- 7. It shall be presumed that any order or record of the court of pleas and quarter sessions, which was made and has been lost or destroyed, was made by a legally constituted court, and the requisite number of justices, without naming said justices. (1865-6, c. 41, s. 12; 1874-5, c. 51; c. 254, s. 3; Code, s. 67; 1893, c. 295; Rev., s. 339; C. S., s. 378.)

Affidavit by Agent Not Sufficient.—In a proceeding under this section an affidavit by the agent of the petitioner that the facts set forth in the complaint "are true to the best of his knowledge, information and belief," is an insufficient verification. Cowles v. Hardin, 79 N. C. 577 (1878).

Waiver of Verification.—The requirement that when one pleading in a court of record is verified, every subsequent pleading in the same proceeding, except a demurrer, must be verified also, is one which may be waived, except in those cases where the form and substance of the verification

is made an essential part of the pleading; as in an action for divorce in which a special form of affidavit is required, § 50-8, in a proceeding to restore a lost record, § 98-14, and in an action against a county or municipal corporation, § 153-64. Calaway

v. Harris, 229 N. C. 117, 47 S. E. (2d) 796 (1948).

Parties.—It seems that all persons whose estates may be affected by a proceeding to restore lost records should be made parties. Cowles v. Hardin, 79 N. C. 577 (1878).

§ 98-15. Records allowed under this chapter to have effect of original records.—The records and registries allowed by the court in pursuance of this chapter shall have the same force and effect as original records and registries. (1865-6, c. 41, s. 14; Code, s. 68; Rev., s. 340; C. S., s. 379.)

Copies Have Only Effect of Originals.— The copies have only the same force and effect as the lost or destroyed deeds would have had, if produced. McNeely v. Laxton, 149 N. C. 327, 63 S. E. 278 (1908).

Negligently Delayed Registration Not

Negligently Delayed Registration Not Affecting Rights of Bona Fide Purchasers.

—When a deed, absolute on its face, but intended as a mortgage, was executed in 1859, and a defeasance was executed in pursuance of the intention of the parties

in 1861, and recorded in 1862, and in 1864 the records were destroyed, subsequent purchasers for value, without actual notice, whose deeds were duly recorded, were not affected with notice of such registration. Nor can reregistration of the defeasance in 1886, after the registration of the mesne conveyances to the innocent purchasers, avail to defeat their rights. Waters v. Crabtree, 105 N. C. 394, 11 S. E. 240 (1890).

§ 98-16. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction.—The recitals, reference to, or mention of any decree, order, judgment or other record of any court of record of any county in which the courthouse, or records of said courts, or both, have been destroyed by fire or otherwise, contained, recited or set forth in any deed of conveyance, paper-writing, or other bona fide written evidence of title. executed prior to the destruction of the courthouse and records of said county, by any executor or administrator with a will annexed, or by any clerk and master, superior court clerk, clerk of the court of pleas and quarter sessions, sheriff, or other officer, or commissioners appointed by either of said courts, and authorized by law to execute said deed or other paper-writing, are deemed, taken and recognized as true in fact, and are prima facie evidence of the existence, validity and binding force of said decree, order, judgment or other record so referred to or recited in said deed or paper-writing, and are to all intents and purposes binding and valid against all persons mentioned or described in said instrument of writing, deed, etc., as purporting to be parties thereto, and against all persons who were parties to said decree, judgment, order or other record so referred to or recited, and against all persons claiming by, through or under them or either of them. (1870-1, c. 86, s. 1; 1871-2, c. 64, s. 1; Code, s. 69; Rev., s. 341; C. S., s. 380.)

Constitutionality.—This section, making recitals in deeds, etc., of judgments, records, etc., evidence, etc., upon condition that the courthouse, records, etc., have been destroyed by fire, etc., is constitutional. Parefoot v. Musselwhite, 153 N. C. 208, 69 S. E. 71 (1910).

Evidence Must Show Destruction of Records.—The fact of the destruction by fire or otherwise of the records must be shown before the recitals, reference to, or mention of any decree, judgment, or other record recited in a deed of conveyance, etc., shall have the effect of evidence under this section. Barefoot v. Musselwhite, 153 N. C. 208, 69 S. E. 71 (1910). See Dail v. Suggs, 85 N. C. 104 (1881).

Application of Section.—This section was applied where a deed made in compliance to a decree of court was destroyed, the recitals in the decree being taken as prima facie evidence of facts and authority. Irvin v. Clark, 98 N. C. 444, 4 S. E. 30 (1887). See Isler v. Isler, 88 N. C. 576 (1883).

Conversely, the recitals in a deed, which refer to the decree, so as to identify it, are of themselves prima facie evidence of its binding force and validity as against all persons who were parties to said decree. Pinnell v. Burroughs, 172 N. C. 182, 90 S. E. 218 (1916). See Hare v. Hollomon, 94 N. C. 14 (1886); Everett v. Newton, 118 N. C. 925, 23 S. E. 961 (1896); Pinnell v. Burroughs, 168 N. C. 315, 84 S. E. 364 (1915).

Where the original papers of the judgment roll have been lost, the minute docket of the court may be introduced to prove the contents thereof. Hare v. Hollomon, 94 N. C. 14 (1886); Everett v. Newton, 118 N. C. 925, 23 S. E. 961 (1896).

§ 98-17. Conveyances reciting court records prima facie evidence thereof.—Such deed of conveyance, or other paper-writing, executed as aforesaid, and registered according to law, may be read in any suit now pending or which may hereafter be instituted in any court of this State, as prima facie evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to be founded, without any other or further restoration or reinstatement of said decree, order, judgment, or record than is contained in this chapter. (1870-1, c. 86, s. 2; Code, s. 70; Rev., s. 342; C. S., s. 381.)

Constitutionality.—The constitutionality open to dispute. Barefoot v. Musselwhite, and validity of this section cannot now be 153 N. C. 208, 69 S. E. 71 (1910).

§ 98-18. Court records and conveyances to which chapter extends.—This chapter shall extend to records of any court which have been or may be destroyed by fire or otherwise, and to any deed of conveyance, paper-writing, or other bona fide evidence of title executed before the destruction of said records. (1871-2, c. 64, s. 2; 1874-5, c. 254, s. 2; Code, s. 71; Rev., s. 343; C. S., s. 382.)

Local Modification.—Cherokee, Graham, Haywood and Madison: C. S., § 384; 1935, c. 25; Moore: C. S., § 383.

- § 98-19. Replacement of stolen, lost or destroyed State or municipal bonds; indemnity bond.—The State Treasurer of the State of North Carolina, by and with the consent and approval of the Governor and Council of State, and the governing boards of the several counties, cities and political subdivisions of the State, is hereby authorized and empowered to make settlement for or issue new bonds for bonds of the State or any of the political subdivisions thereof, which have been stolen, lost or destroyed: Provided, that there is furnished an indemnity bond in double the amount of the said bonds, said indemnity bond to be approved by the State Treasurer or the governing boards of any political subdivision of the State issuing said replacement bonds: Provided further, that said indemnity bond shall clearly designate the bonds which have been stolen, lost or destroyed. (1935, c. 292, s. 1.)
- § 98-20. Expenses borne by applicant.—All expenses in connection with printing and issuing any replacement bonds provided for in this article shall be borne by the person making application therefor. (1935, c. 292, s. 2.)

Chapter 99.

Libel and Slander.

Sec.

99-1. Libel against newspaper; defamation by or through radio or television station; notice before action.

99-2. Effect of publication or broadcast in good faith and retraction.

99-3. Anonymous communications.

99-4. Charging innocent woman with incontinency.

99-5. Negligence in permitting defamatory statements by others essential to liability of operator, etc., of broadcasting station.

§ 99-1. Libel against newspaper; defamation by or through radio or television station; notice before action.—(a) Before any action, either civil or criminal, is brought for the publication, in a newspaper or periodical, of a libel, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the article and the statements therein which he alleges to be false and defamatory.

(b) Before any action, either civil or criminal, is brought for the publishing, speaking, uttering, or conveying by words, acts or in any other manner of a libel or slander by or through any radio or television station, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the time of and the words or acts which he or they allege to be false and defamatory. (1901, c. 557; Rev., s. 2012; C. S., s.

2429; 1943, c. 238, s. 1.)

Cross References.-As to criminal statutes on libel and slander, see §§ 14-47 and 14-48. As to the making of derogatory reports concerning banks, see § 53-128; concerning building and loan associations, see § 54-44. As to pleadings in libel and slander. see § 1-158. As to statute of limitations for libel, see § 1-54; for slander, see § 1-55. As to allowance of costs in an action for libel and slander, see § 6-18.

Editor's Note. - The 1943 amendment

added subsection (b).

Constitutionality. — Laws 1901, c. 557, known as the "London Libel Law" and subsequently appearing as §§ 2429, 2430 and 2431 of the Consolidated Statutes (now §§ 99-1, subsec. (a), 99-2, subsec. (a), and 99-3, respectively), was held constitutional in Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904), cited in Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626 (1927). See note to § 99-2.

Service of Notice under § 1-585 Distinguished.—This and § 1-585 have no relation one to the other. The provision for service of notice in this section refers to an act to be performed as a condition precedent to the institution of the action, whereas the provision as to service of notices in § 1-585 refers to acts to be performed after an action is instituted. Roth v. Greensboro News Co., 214 N. C. 23, 197 S. E. 569 (1938).

Complaint Must Allege Notice.--Under this section a complaint in an action for libel must allege the giving of five days' notice to the defendant in writing, specifying the article and the statements herein alleged to be false. Williams v. Smith, 134 N. C. 249, 46 S. E. 502 (1904).

And Demurrer Lies for Failure to Allege Notice.—In an action against a newspaper for libel, the failure of the complaint to allege the five days' notice renders it demurrable. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

Amendment Showing Notice.--Where a demurrer was sustained to a complaint for libel against a newspaper because it failed to appear that notice of the action had been given, the trial court may permit an amendment showing that fact. Osborn v. Leach.

135 N. C. 628, 47 S. E. 811 (1904).

Letter as Sufficient Notice. - A letter written by plaintiff and received by defendant, in which demand is made for a retraction and apology for a clearly specified article, in which the alleged false and defamatory statements are plainly indicated, is a sufficient notice in writing as required by this section, the provisions of § 1-585 relating to notice in judicial proceedings after suit has been instituted, not being applicable. Roth v. Greensboro News Co., 214 N. C. 23, 197 S. E. 569 (1938).

When Notice Unnecessary.—In an action for libel, where the newspaper publishes a retraction, no notice need be given. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

As to whether the provisions of this

chapter as to notice to the defendant in an action for libel, looking to retraction and apology, apply to individuals having no connection with a newspaper publishing the libel, was questioned in Paul v. National Auction Co., 181 N. C. 1, 105 S. E. 881 (1921).

Failure of Notice.—In an action for libel against a newspaper the failure to give notice of the action as required only relieves the paper of punitive damages. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

Compensatory Damages.—This and the following section, relating to notice look-

ing to a retraction and apology, having significance only on the question of punitive damages, do not include compensatory damages for "pecuniary loss, physical pain, mental suffering, and injury to reputation." In Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904), it was held that an action for libel may proceed for the recovery of compensatory damages, whether the notice has been given or otherwise. Paul v. National Auction Co., 181 N. C. 1, 105 S. E. 881 (1921).

Applied in Harrell v. Goerch, 209 N. C.

741, 184 S. E. 489 (1936).

§ 99-2. Effect of publication or broadcast in good faith and retraction.—(a) If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such a state of facts, the defendant shall be fined a penny and the costs, and no more.

(b) If it appears upon the trial that such words or acts were conveyed and broadcast in good faith, that their falsity was due to an honest mistake of the facts, or without prior knowledge or approval of such station, and if with prior knowledge or approval that there were reasonable grounds for believing that the words or acts were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was conveyed or broadcast by or over such radio or television station at approximately the same time of day and by the same sending power so as to be as visible and audible as the original acts or words complained of, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such state of facts, the defendant shall be fined a penny and costs, and no more. (1901, c. 557; Rev., s. 2013; C. S., s. 2430: 1943, c. 238, s. 2.)

Editor's Note. — The 1943 amendment

added subsection (b).

Constitutionality.—Subsection (a) of this section, providing that a newspaper publishing a libel may avoid, under certain conditions, the payment of punitive damages is not discriminatory, but a constitutional enactment. Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626 (1927). See Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

A recovery of actual damages does not abridge the freedom of the press, as inhibited by our Constitution, art. 1, § 20. Pentuff v. Park, 194 N. C. 146, 138 S. E.

616, 53 A. L. R. 626 (1927).

Same—Applies Equally to All Newspapers.—Where a statute for libel applies equally to all newspapers and periodicals, it does not amount to unconstitutional discrimination. Osborn v. Leach, 135 N. C.

628, 47 S. E. 811 (1904).

Form of Retraction.—While this section does not prescribe any particular form of retraction, it does require a categorical retraction and apology, and the mere statement that defendant had come into possession of information contrary to that theretofore published is insufficient to meet the requirements of this section, nor was it incumbent on plaintiff to approve or disapprove thereof, and his failure to do so does not exculpate defendant or preclude the submission of an issue of punitive damages. Roth v. Greensboro News Co., 217 N. C. 13, 6 S. E. (2d) 882 (1940).

"Actual Damages."—The "actual damages" recoverable in a suit for libelous publication by a newspaper in the event of a retraction, allowed by the statute, is for pecuniary loss, direct or indirect, or for physical pain and inconvenience. Pentuff

v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626 (1927). Actual damages also include mental suffering and injury to reputation. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

Damages When Defendants Do Not Comply.—Where the defendants did not avail themselves of the privilege given them under this section, the damages that may be awarded would include punitive as well as actual damages. Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626 (1927).

Damages as "Property".—The right to have punitive damages assessed is not property, but the right to recover actual or compensatory damages is property. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

Only Actual Damages Where Publication in Good Faith Is Followed by Correction.—Where plaintiff's evidence establishes a false publication, and defendant's evidence shows that the publication was made in good faith through error, and that a correction and retraction was published upon defendant ascertaining the facts, plaintiff is entitled to recover the actual

damage sustained by him. Lay v. Gazette Pub. Co., 209 N. C. 134, 183 S. E. 416 (1936).

And No Punitive Damages in the Absence of Malice, or Wantonness and Recklessness.—Lay v. Gazette Pub. Co., 209 N. C. 134, 183 S. E. 416 (1936).

When Malice May Not Be Inferred by Jury.—Malice may not be inferred by the jury from a false publication when defendant's uncontradicted evidence rebuts the presumption by showing that the publication was made in good faith through error, and that a correction and retraction was published upon defendant ascertaining the facts. Lay v. Gazette Pub. Co., 209 N. C. 134, 183 S. E. 416 (1936).

Defendant's Pleading.—In an action for libel against a newspaper, the paper having pleaded a retraction of the publication, it is necessary for the defendant to show that the publication was made in good faith, and with reasonable ground to believe it to be true, in order to relieve the paper from punitive damages. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

§ 99-3. Anonymous communications.—The two preceding sections shall not apply to anonymous communications and publications. (1901, c. 557, s. 3; Rev., s. 2014; C. S., s. 2431.)

An article signed "Smith" is not an Williams v. Smith, 134 N. C. 249, 46 S. E. anonymous publication under this section. 502 (1904).

§ 99-4. Charging innocent woman with incontinency.—Whereas doubts have arisen whether actions of slander can be maintained against persons who may attempt, in a wanton and malicious manner, to destroy the reputation of innocent and unprotected women, whose very existence in society depends upon the unsullied purity of their character, therefore any words written or spoken of a woman, which may amount to a charge of incontinency, shall be actionable. (1808, c. 478; R. C., c. 106; Code, s. 3763; Rev., s. 2015; C. S., s. 2432.)

Cross Reference.—As to criminal liability for slandering innocent women, see § 14-48. Editor's Note.—See 12 N. C. Law Rev.

This section is explicit and positive in its operative part. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342 (1888).

Meaning of "Innocent Woman."—The

Meaning of "Innocent Woman."—The words "an innocent woman" in § 14-48, and "innocent and unprotected woman" in this section, should be construed to mean innocent of illicit sexual intercourse, as affecting a woman's reputation when the slanderous words are spoken. The purpose of these sections is to protect women who, however imprudent they may have been in other respects, have not so far "stooped to folly" as to surrender their chastity and become incontinent, or who have regained their characters if a "slip has been made," from "the wanton and malicious slander"

of persons who may attempt to destroy their reputations and blast and ruin their characters. State v. Ferguson, 107 N. C. 841, 12 S. E. 574 (1890); State v. Johnson, 182 N. C. 883, 109 S. E. 786 (1921).

Words Must Charge Adultery or Fornication.—Words which impute to a female a wanton and lascivious disposition only are not actionable. Lucas v. Nichols, 52 N. C. 32 (1859).

The words, which amount to a charge of incontinency, must import not merely a lascivious disposition, but the criminal act of adultery or fornication. McBrayer v. Hill, 26 N. C. 136 (1843).

Where a telegraph company transmits a message containing a charge of incontinency against a woman, demurrer to the evidence, as in case of nonsuit, is properly denied. Parker v. Edwards, 222 N. C. 75, 21 S. E. (2d) 876 (1942).

Complaint.—It is not necessary that the complaint, in an action under this section, should allege that the words were "wantonly and maliciously" uttered. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342 (1888).

Action by Husband.—An action by a husband for slander of his wife, the wife not being a party and the complaint alleging no special damage to the husband, will be dismissed on motion of the defendant, or ex mero motu, for failure of the complaint to state a cause of action. Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161 (1893).

Evidence.—Testimony by witnesses of statements made by defendant charging in effect that plaintiff had been guilty of illicit sexual intercourse, is competent although not in the exact words alleged in the bill of particulars, it being sufficient if the testimony is confined in substance to the bill of particulars. Bryant v. Reedy, 214 N. C. 748, 200 S. E. 896 (1939).

Damages.—In an action by a woman for slander, for words alleged to have been spoken, amounting to a charge of incontinency, the plaintiff may, in the absence of proof of actual special damages recover compensatory damages; and upon proof that the words were spoken with malice, or that the conduct of the defendant was oppressive, vindictive damages may be awarded. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342 (1888).

Same — Words Charging Incontinency Actionable Per Se. — Words charging an innocent woman with conduct amounting to incontinency are actionable per se, under this section, and the law will presume damages in such cases which naturally, proximately and necessarily result therefrom, including mental suffering, humiliation and embarrassment, and testimony of such mental suffering, humiliation and embarrassment is competent without specific allegation thereof. Bryant v. Reedy, 214 N. C. 748, 200 S. E. 896 (1939).

As under this section the charge of incontinency made against an innocent woman, in whatever words written or spoken, conveyed to the hearer, is per se actionable, their utterance must be followed by the same consequence as to damages as the publishing of other defamatory imputations. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342 (1888).

Instances of Charging Incontinency.— The words: "If the plaintiff (an unmarried woman) did not give birth to a child, she missed a good chance of having it," themselves imply an illicit sexual intercourse. Sowers v. Sowers, 87 N. C. 303 (1882).

To say of a woman, that "she was kept by a man" is actionable as a slander under our act of assembly. McBrayer v. Hill, 26 N. C. 136 (1843).

Charging Incontinency under Criminal Statute.—Section 14-48 makes it a misdemeanor to charge an innocent woman with incontinency. The wording is similar to this section and the following expressions which were held to amount to charges of incontinency, though decided in criminal cases, would seem to apply here.

Charging a woman with having had sexual intercourse with a male dog amounts to a charge of incontinency. State v. Hewlin, 128 N. C. 571, 37 S. E. 952 (1901).

Calling an innocent woman "a d—d whore," in a loud and angry manner in the hearing alone of the wife of the speaker, is a charge of incontinency within the meaning of the statute. State v. Shoemaker, 101 N. C. 690, 8 S. E. 332 (1888).

Same — Words Not Sufficient. — The words that a woman "looked like a woman who had miscarried," do not, per se imply a charge of incontinence. State v. Benton, 117 N. C. 788, 23 S. E. 432 (1895). Calling a woman a "damned bitch" held

Calling a woman a "damned bitch" held not a charge of incontinency. State v. Harwell, 129 N. C. 550, 40 S. E. 48 (1901).

Same—Question for Jury.— When the words are ambiguous and admit of a slanderous interpretation, it becomes a question for the jury to determine whether they amounted to the slanderous charge in the reasonable apprehension of the hearers. State v. Howard, 169 N. C. 312, 84 S. E. 807 (1915).

Stated in Harshaw v. Harshaw, 220 N. C. 145, 16 S. E. (2d) 666, 136 A. L. R. 1411 (1941).

§ 99-5. Negligence in permitting defamatory statements by others essential to liability of operator, etc., of broadcasting station.—The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damage for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless

such owner, licensee or operator shall be guilty of negligence in permitting any such defamatory statement. (1949, c. 262.)

Editor's Note.—For brief comment on section, see 27 N. C. Law Rev. 488.

Chapter 100.

Monuments, Memorials and Parks.

Article 1.

Memorials Commission.

Sec.

100-1. Memorials Commission created; members; officers; quorum, etc.

100-2. Approval of memorials before acceptance by State; regulation of existing memorials, etc.; "work of art" defined; highway markers.

100-3. Approval of design, etc., of certain bridges and other structures.

100-4. Governor to accept works of art approved by Commission.

100-5. Duties as to buildings erected or remodeled by State.

100-6. Disqualification to vote on work of art, etc.; vacancy.

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100-8. Memorials to persons within twenty-five years of death; acceptance of commemorative funds for useful work.

Article 2.

Memorials Financed by Counties and Cities.

100-9. County commissioners may protect monuments.

Sec.

100-10. Counties, cities, and towns may contribute toward erection of memorials.

Article 3.

Mount Mitchell Park.

100-11. Duties.

100-12. Roads, trails, and fences authorized; protection of property.

100-13. Fees for use of improvements; fees for other privileges; leases; rules and regulations.

100-14. Use of fees and other collections.

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Article 4.

Toll Roads or Bridges in Public Parks.

100-16. Private operation of toll roads or bridges in public parks prohibited.

ARTICLE 1.

Memorials Commission.

§ 100-1. Memorials Commission created; members; officers; quorum, etc.—A Memorials Commission in and for the State of North Carolina is hereby created, to consist of the following officials, ex officio: The Governor of North Carolina, the Secretary of the North Carolina Historical Commission, the head of the art department of the University of North Carolina at Chapel Hill, the head of the history department of the University of North Carolina at Chapel Hill, and the head of the department of architecture of the North Carolina State College of Agriculture and Engineering. The Memorials Commission shall have the power to adopt its own rules and to elect such officers from its own members as may be deemed proper. Three commissioners shall constitute a quorum. The members shall serve without compensation. (1941, c. 341, s. 1.)

§ 100-2. Approval of memorials before acceptance by State; regulation of existing memorials, etc.; "work of art" defined; highway markers.—No memorial or work of art shall hereafter become the property of the State by purchase, gift or otherwise, unless such memorial or work of art or a design of the same, together with the proposed location of the same, shall first have been submitted to and approved by said Memorials Commission; nor shall any memorial or work of art, until so submitted and approved, be contracted for, placed in or upon or allowed to extend over any property belonging to the State. No existing memorial or work of art owned by the State shall be removed, relocated, or altered in any way without approval of the Memorials

Commission. The term "work of art" as used in this section shall include any painting, portrait, mural decoration, stained glass, statue, bas-relief, sculpture, monument, tablet, fountain, or other article or structure of a permanent character intended for decoration or commemoration. This section, however, shall not apply to markers set up by the State Highway and Public Works Commission in co-operation with the Department of Conservation and Development and the State Historical Commission as provided by chapter one hundred and ninety-seven of the Public Laws of one thousand nine hundred and thirty-five. (1941, c. 341, s. 2.)

- § 100-3. Approval of design, etc., of certain bridges and other structures.—No bridge, arch, gate, fence or other structure intended primarily for ornamental or memorial purposes and which is paid for either wholly or in part by appropriation from the State treasury, or which is to be placed on or allowed to extend over any property belonging to the State, shall be begun unless the design and proposed location thereof shall have been submitted to said Memorials Commission and approved by it. Furthermore, no existing structures of the kind named and described in the preceding part of this section owned by the State, shall be removed or remodeled without submission of the plans therefor to the Commission and approval of said plans by the Commission. This section shall not be construed as amending or repealing chapter one hundred and ninety-seven of the Public Laws of one thousand nine hundred and thirty-five. (1941, c. 341, s. 3.)
- § 100-4. Governor to accept works of art approved by Commission.—The Governor of North Carolina is hereby authorized to accept, in the name of the State of North Carolina, gifts to the State of works of art as defined in § 100-2. But no work of art shall be so accepted unless and until the same shall have been first submitted to said Memorials Commission and by it judged worthy of acceptance. (1941, c. 341, s. 4.)
- § 100-5. Duties as to buildings erected or remodeled by State.— Upon request of the Governor and the Board of Public Buildings and Grounds, said Memorials Commission shall act in an advisory capacity relative to the artistic character of any building constructed, erected, or remodeled by the State. The term "building" as used in this section shall include structures intended for human occupation, and also bridges, arches, gates, walls, or other permanent structures of any character not intended primarily for purposes of decoration or commemoration. (1941, c. 341, s. 5.)
- § 100-6. Disqualification to vote on work of art, etc.; vacancy.—Any member of said Memorials Commission who shall be employed by the State to execute a work of art or structure of any kind requiring submission to the Commission, or who shall take part in a competition for such work of art or structure, shall be disqualified from voting thereon, and the temporary vacancy thereby created may be filled by appointment by the Governor. (1941, c. 341, s. 6.)
- § 100-7. Construction.—The provisions of this article shall not be construed to include exhibits of an educational nature arranged by museums or art galleries administered by the State or any of its agencies or institutions, or to prevent the placing of portraits of officials, officers, or employees of the State in the offices or buildings of the departments, agencies, or institutions with which such officials, officers, or employees are or have been connected. But upon request of such museums or agencies, said Memorials Commission shall act in an advisory capacity as to the artistic qualities and appropriations of memorial exhibits or works of art submitted to it. (1941, c. 341, s. 7.)
- § 100-8. Memorials to persons within twenty-five years of death; acceptance of commemorative funds for useful work.—No monument,

statue, tablet, painting, or other article or structure of a permanent nature intended primarily to commemorate any person or persons shall be purchased from State funds or shall be placed in or upon or allowed to extend over State property within twenty-five years after the death of the person or persons so commemorated: Provided, nevertheless, that nothing in this article shall be interpreted as prohibiting the acceptance of funds by State agencies or institutions from individuals or societies who wish to commemorate some person or persons by providing funds for educational, health, charitable, or other useful work. The agency or institution to which such funds are offered for memorial enterprises shall exercise its discretion as to the acceptance and expenditure of such funds. (1941, c. 341, s. 8.)

ARTICLE 2.

Memorials Financed by Counties and Cities.

§ 100-9. County commissioners may protect monuments.—When any monument has been or shall hereafter be erected to the memory of our Confederate dead or to perpetuate the memory and virtues of our distinguished dead, if such monument is erected by the voluntary subscription of the people and is placed on the courthouse square, the board of county commissioners of such county are permitted to expend from the public funds of the county an amount sufficient to erect a substantial iron fence around such monument in order that the same may be protected. (1905, c. 457; Rev., s. 3928; C. S., s. 6934.)

Cross Reference.—As to criminal liability for defacing or removing monuments. see § 14-148.

§ 100-10. Counties, cities, and towns may contribute toward erection of memorials.—Any county, city or town by resolution first adopted by its governing body may become a member of any memorial association or organization for perpetuating the memory of the soldiers and sailors of North Carolina who served the United States in the great World War, or in the global war known as World War II, or who fought in the War between the States, and may subscribe and pay toward the cost of the erection of any memorial to the memory of such soldiers and sailors such sums of money as its governing body may determine, and may be represented in such association or organization by such persons as its governing body may select. Any contribution so made shall be paid out of the general fund of such county, city, or town making same, on such terms as may be agreed upon by its governing body, and the officers having the control and management of the association or organization to which subscription and contribution are made. (1919, c. 21, ss. 1, 2, 3; C. S., s. 6938; 1923, c. 200; 1945, c. 117.)

Editor's Note.—By the 1923 amendment there was added to this section the provi- 1945 amendment inserted the words "or in sion for perpetuating the memory of the the global war known as World War II."

soldiers and sailors of the Civil War. The

ARTICLE 3.

Mount Mitchell Park.

§ 100-11. Duties.—The Board of Conservation and Development shall have complete control, care, protection and charge of that part of Mitchell's Park acquired by the State. (1915, c. 76; 1919, c. 316, s. 3; C. S., s. 6940; 1921, c. 222, s. 1; 1925, c. 122, s. 23.)

Editor's Note.—The 1921 amendment made the North Carolina Geological and were in turn replaced by the Board of Con-Economic Survey and the Geological servation and Development by authority Board the successor of the Mount Mitchell of the 1925 amendment. Park Commission and the Mitchell Peak

Park Commission. The Survey and Board

- § 100-12. Roads, trails, and fences authorized; protection of property.—The Board of Conservation and Development is authorized and empowered to enter upon the land hereinbefore referred to, and to build a fence or fences around the same, also roads, paths, and trails and protect the property against trespass and fire and injury of any and all kinds whatsoever; cut wood and timber upon the same, but only for the purpose of protecting the other timber thereon and improving the property generally. (1919, c. 316, s. 5; C. S., s. 6942; 1921, c. 222, s. 1; 1925, c. 122, s. 23.)
- § 100-13. Fees for use of improvements; fees for other privileges; leases; rules and regulations.—The Board of Conservation and Development is further authorized and empowered to charge and collect fees for the use of such improvements as have already been constructed, or may hereafter be constructed, on the Park, and for other privileges connected with the full use of the Park by the public; to lease sites for camps, houses, hotels, and places of amusement and business; and to make and enforce such necessary rules and regulations as may best tend to protect, preserve, and increase the value and attractiveness of the Park. (1921, c. 222, s. 2; C. S., s. 6942(a); 1925, c. 122, s. 23.)
- § 100-14. Use of fees and other collections.—All fees and other money collected and received by the Board of Conservation and Development in connection with its proper administration of Mount Mitchell State Park shall be used by said Board for the administration, protection, improvement, and maintenance of said Park. (1921, c. 222, s. 3; C. S., s. 6942(b); 1925, c. 122, s. 23.)
- § 100-15. Annual reports.—The Board of Conservation and Development shall make an annual report to the Governor of all money received and expended by it in the administration of Mount Mitchell State Park, and of such other items as may be called for by him or by the General Assembly. (1921, c. 222, s. 4; C. S., s. 6942(c); 1925, c. 122, s. 23.)

ARTICLE 4.

Toll Roads or Bridges in Public Parks.

§ 100-16. Private operation of toll roads or bridges in public parks prohibited.—No person, firm or corporation shall have the right or privilege to privately operate any toll road or toll bridge in this State upon lands belonging to the State, set apart or designated as a public park.

In the event any such toll road or bridge is on March 17, 1939 being privately operated under any real or assumed right, privilege, or lease, the State institution or department having such State-owned property in charge or under its supervision shall immediately give notice to such person, firm or corporation so operating such toll road or toll bridge to discontinue the operation of the same.

Any person, firm or corporation who sustains any legal damage by reason of the exercise of the authority hereinbefore granted shall be entitled to just compensation therefor, and, in the event satisfactory settlement cannot be made with the department or State agency exercising the authority herein contained, the amount of just compensation may be determined by a special proceeding instituted by the claimant against the department or agency having such property in custody under the provisions of the chapter on Eminent Domain, in so far as the same may be applicable hereto: Provided, such proceeding shall be instituted within six months from the time such notice is given. Any compensation awarded shall be a valid claim against the State of North Carolina, payable out of the funds of the department or State agency having such property in charge. (1939, c. 127.)

Chapter 101.

Names of Persons.

Sec.

101-1. Legislature may regulate change by general but not private law.

101-2. Procedure for changing name; petition; notice.

101-3. Contents of petition.

Sec

101-4. Proof of good character to accom-

pany petition. 101-5. Clerk to order change; certificate and record.

101-6. Effect of change: only one change.

§ 101-1. Legislature may regulate change by general but not private law.—The General Assembly shall not have power to pass any private law to alter the name of any person, but shall have power to pass general laws regulating the same. (Const., Art. II, s. 11; Rev., s. 2146; C. S., s. 2970.)

As to resumption of maiden name by a to trademarks, etc., see chapter 80. woman after divorce, see § 50-12. As to

Cross References.—As to changing name duty to disclose real name when trading of minor child upon adoption, see § 48-14. as "company" or "agent," see § 59-89. As

§ 101-2. Procedure for changing name; petition; notice.—A person who wishes, for good cause shown, to change his name must file his application before the clerk of the superior court of the county in which he lives, having first given ten days' notice of the application by publication at the courthouse door.

Applications to change the name of minor children may be filed by their parent or parents or guardian or next friend of such minor children, and such applications may be joined in the application for a change of name filed by their parent or parents: Provided nothing herein shall be construed to permit one parent to make such application on behalf of a minor child without the consent of the other parent of such minor child if both parents be living. (1891, c. 145; Rev., s. 2147; C. S., s. 2971; 1947, c. 115.)

Local Modification.—Chowan: 1945, c. Editor's Note. - The 1947 amendment 455; Mitchell: 1945, c. 389. added the second paragraph.

§ 101-3. Contents of petition.—The applicant shall state in the application his true name, the name he desires to adopt, his reasons for desiring such change, and whether his name has ever before been changed by law, and, if so, the facts with respect thereto. (1891, c. 145; Rev., s. 2147; C. S., s. 2972; 1945, c. 37, s. 1.)

Editor's Note. - Prior to the 1945 the first "and" read "that his name has amendment the part of the section after never been changed before by law,"

- § 101-4. Proof of good character to accompany petition.—The applicant shall also file with said petition proof of his good character, which proof must be made by at least two citizens of the county who know his standing. (1891, c. 145; Rev., s. 2148; C. S., s. 2973.)
- § 101-5. Clerk to order change; certificate and record.—If the clerk thinks that good and sufficient reason exists for the change of name, it shall be his duty to issue an order changing the name of the applicant from his true name to the name sought to be adopted. He shall issue to the applicant a certificate under his hand and seal of office, stating the change made in the applicant's name, and shall also record said application and order on the docket of special proceedings in his court. (1891, c. 145; Rev., ss. 2149, 2150; C. S., s. 2974.)
- § 101-6. Effect of change; only one change.—When the order is made and the applicant's name changed, he is entitled to all the privileges and protection under his new name as he would have been under the old name. No person shall be allowed to change his name under this chapter but once, except

that he shall be permitted to resume his former name upon compliance with the requirements and procedure set forth in this chapter for change of name. (1891, c. 145; Rev., ss. 2147, 2149; C. S., s. 2975; 1945, c. 37, s. 2.)

Editor's Note.—The 1945 amendment added the exception clause at the end of the section.

Chapter 102.

Official Survey Base.

Sec.		Sec.
102-1.	Name and description.	102-6. Legality of use in descriptions.
102-2.	Physical control.	102-7. Use not compulsory.
102-3.	Use of name.	102-8. Administrative agency.
102-4.	Damaging, defacing, or destroying	102-9. Duties and powers of the agency.
	monuments.	102-10. Prior work.
102-5.	Limitations of use.	102-11. Vertical control.

- § 102-1. Name and description.—The official survey base for the State of North Carolina shall be a system of plane co-ordinates to be known as the "North Carolina Co-ordinate System," said system being defined as a Lambert conformal projection of Clarke's spheroid of one thousand eight hundred sixty-six, having a central meridian of 79°—00′ west from Greenwich and standard parallels of latitude of 34°—20′ and 36°—10′ north of the equator, along which parallels the scale shall be exact. All co-ordinates of the system are expressed in feet, the x co-ordinate being measured easterly along the grid and the y co-ordinate being measured northerly along the grid. The origin of the co-ordinates is hereby established on the meridian 79°—00′ west from Greenwich at the intersection of the parallels 33°—45′ north latitude, such origin being given the co-ordinates x=2,000,000 feet, y=0 feet. The precise position of said system shall be as marked on the ground by triangulation or traverse stations or monuments established in conformity with the standards adopted by the United States Coast and Geodetic Survey for first- and second-order work, whose geodetic positions have been rigidly on the North American datum of one thousand nine hundred twenty-seven, and whose plane co-ordinates have been computed on the system defined. (1939, c. 163, s. 1.)
- § 102-2. Physical control.—Any triangulation or traverse station or monument established as described in § 102-1 may be used in establishing a connection between any survey and the above mentioned system of rectangular co-ordinates. (1939, c. 163, s. 2.)
- § 102-3. Use of name.—The use of the term "North Carolina Co-ordinate System" on any map, report, or survey, or other document, shall be limited to co-ordinates based on the North Carolina Co-ordinate System as defined in this chapter. (1939, c. 163, s. 3.)
- § 102-4. Damaging, defacing, or destroying monuments.—If any person shall willfully damage, deface, destroy, or otherwise injure a station, monument or permanent mark of the North Carolina Co-ordinate System, or shall oppose any obstacles to the proper, reasonable, and legal use of any such station or monument, such person shall be guilty of a misdemeanor, and shall be liable to fine or imprisonment at the discretion of the court. (1939, c. 163, s. 4.)
- § 102-5. Limitations of use.—No co-ordinates based on the North Carolina Co-ordinate System purporting to define the position of a point on a land boundary shall be presented to be recorded in public land records or deed records unless such point in the survey is within one-half mile of a station or monument of the North Carolina Co-ordinate System: Provided, that the administrative agency for said system may, by rules and regulations, increase or decrease such limiting distance for the whole State, or any area or areas thereof. (1939, c. 163, s. 5.)
- § 102-6. Legality of use in descriptions.—For the purpose of describing the location of any survey station or land boundary corner in the State of

North Carolina, it shall be considered a complete, legal, and satisfactory description to define the location of such point or points by means of co-ordinates of the North Carolina Co-ordinate System as described herein, and within the limitations of § 102-5. (1939, c. 163, s. 6.)

- § 102-7. Use not compulsory.—Nothing contained in this chapter shall be interpreted as requiring any purchaser or mortgagee to rely wholly on a description based upon the North Carolina Co-ordinate System. (1939, c. 163, s. 7.)
- § 102-8. Administrative agency.—The administrative agency of the North Carolina Co-ordinate System shall be the North Carolina Department of Conservation and Development, through its appropriate division hereinafter called the "agency." (1939, c. 163, s. 8.)
- § 102-9. Duties and powers of the agency.—It shall be the duty of the agency to make or cause to be made from time to time such surveys and computations as are necessary to further or complete the North Carolina Co-ordinate System. The agency shall endeavor to carry to completion as soon as practicable the field monumentation and office computations of the Co-ordinate System. For the purpose of this work the agency shall have the power to accept grants for the specific purpose of carrying on the work; to co-ordinate, organize, and direct any federal or other assistance which may be offered to further the work; to co-operate with any individual, firm, company, public or private agency, State or iederal agencies, in the prosecution of the work; to enter into contracts or co-operative agreements with other state or federal agencies in promoting the work of the co-ordinating system. The agency shall further have the power to adopt necessary rules, regulations, and specifications relating to the establishment and use of the co-ordinate system as defined in this chapter, consistent with the standards and practice of the United States Coast and Geodetic Survey. (1939, c. 163, s. 9.)
- § 102-10. Prior work.—The system of stations, monuments, traverses, computations, and other work which has been done or is under way in North Carolina by the so-called North Carolina Geodetic Survey, under the supervision of the United States Coast and Geodetic Survey, is, where consistent with the provisions of this chapter, hereby made a part of the North Carolina Co-ordinate System. The surveys, notes, computations, monuments, stations, and all other work relating to the co-ordinate system, which has been done by said North Carolina Geodetic Survey, under the supervision of and in co-operation with the United States Coast and Geodetic Survey and federal relief agencies, hereby are placed under the direction of, and shall become the property of, the administrative agency, subject to the agreement of the federal Works Progress Administration. (1939, c. 163, s. 10.)
- § 102-11. Vertical control.—Whereas the foregoing provisions of this chapter heretofore are related to horizontal control only, the administrative agency may adopt standards for vertical control or levying surveys consistent with those recommended by and used by the United States Coast and Geodetic Survey, and make or cause to be made such surveys as are necessary to complete the vertical control of North Carolina, in accordance with the provisions for horizontal control surveys as defined in this chapter. (1939, c. 163, s. 11.)

Chapter 103.

Sundays and Holidays.

Sec. Sec

103-1. Work in ordinary calling on Sunday forbidden.

103-2. Hunting on Sunday.

Sec.

103-3. What process executed on Sunday.

103-4. Dates of public holidays.

103-5. Acts to be done on Sunday or holidays.

§ 103-1. Work in ordinary calling on Sunday forbidden. - On the Lord's Day, commonly called Sunday, no tradesman, artificer, planter, laborer, or other person shall, upon land or water, do or exercise any labor, business or work, of his ordinary calling, works of necessity and charity alone excepted, nor employ himself in hunting, fishing or fowling, nor use any game, sport or play, upon pain that every person so offending, being of the age of fourteen years and upwards, shall forfeit and pay one dollar. (1741, c. 30, s. 2; R. C., c. 115; Code, s. 3782; Rev., s. 2836; C. S., s. 3955.)

Local Modification.—Catawba: 1949, c. 1117; Forsyth: C. S., § 3957; Johnston: 1925, c. 185; Robeson: Pub. Loc. 1925, c.

Cross References. - As to Sunday fishing, see § 113-247. As to taking oysters on Sunday, see § 113-210. As to unloading oysters on Sunday, see § 113-211.

"Sunday Laws" Not Based upon Reli-

gious Grounds.-If the observance of Sunday were commanded by statute as an act of religion or worship, such statute would be absolutely forbidden. Under our Constitutions, both State and federal, no act can be required or forbidden by statute because such act may be in accordance with or opposed to the religious views of anyone. If, therefore, the cessation of labor or the prohibition or performance of any act were provided by statute for religious reasons, the statute could not be maintained. The only ground upon which "Sunday laws" can be sustained is that, in pursuance of the police power, the State can and cught to require a cessation of labor upon specified days, to protect the masses from being worn out by incessant and unremitting toil. If such days happen to be those upon which the larger part of the people observe a cessation of toil for religious reasons, it is not an objection but a convenience. Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19 (1904), containing an extensive review of the "Sunday laws."

Acts Not Forbidden May Be Done on Sunday.—It is said in State v. Ricketts, 74 N. C. 187 (1876): "In this State every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there is some statute forbidding it to be done on that day." Rodman v. Robinson, 134 N. C. 503, 507, 47 S. E. 19 (1904).

Power to Prohibit Labor-Public and Private. - In Melvin v. Easley, 52 N. C. 356 (1860), it was held that the statute is confined to manual, visible or noisy labor, such as is calculated to disturb other people; for example, keeping open shop or working at a blacksmith's anvil. The legislature has power to prohibit labor of this kind on Sunday, on the ground of public decency. But when it goes further and prohibits labor which is done in private, the power is exceeded and the statute is void. Rodman v. Robinson, 134 N. C. 503. 47 S. E. 19 (1904).

Keeping "Open Shop" on Sunday Not an Indictable Offense.—This section does not make keeping open shop and selling goods on Sunday an indictable offense, and an ordinance of a town, passed in pursuance of this section, for better government of the town, prohibiting keeping open stores and other places of business on Sunday for the purpose of buying and selling, excepting ice, drugs and medicines, and permitting drug stores to sell soft drinks, etc., within certain hours, is not objectionable on the ground that the offense is covered by this section, for the ordinance is passed under the police powers of the town, its violation is indictable, and in furtherance of local government, which the statute contemplates. State v. Medlin, 170 N. C. 682, 86 S. E. 597 (1915), citing State v. Brooksbank, 28 N. C. 73 (1845). Sunday Business May Be Regulated by

Ordinance.—It is against the public policy of this State that one should pursue his ordinary business calling on Sunday, and such may not only be regulated by town ordinances, but altogether prohibited on that day; and an ordinance of this kind is not rendered invalid, as unduly discriminative,

by reason of an exception in favor of drug stores or on account of this section. State v. Burbage, 172 N. C. 876, 89 S. E. 795 (1916).

Commissioners of a town may, by valid ordinance, prohibit the opening of places of business in the town on Sunday, excepting drug stores. State v. Medlin, 170 N. C. 682, 86 S. E. 597 (1915).

Sunday Contracts.—This section does

not invalidate a Sunday contract which was not an act done as a part of the party's usual business or calling. Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19 (1904), holding that a contract for the conveyance of land entered into on Sunday was not invalid under this section.

It would be downright hypocrisy for a court to affect to believe that the moral sense of the community would be shocked by compelling a man to pay a note given for an honest debt because it was executed on the Lord's Day. And the same is true of the enforcement of any contract which is not forbidden by statute to be made on Sunday. Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19 (1904).

Same-Check.-Where a mechanic has repaired an automobile for its owner during the week, and delivered possession to him on Sunday on receipt of his check to cover his charges, the fact that the check was dated on Sunday does not render it invalid under this section, or permit the owner to stop its payment and retain the car in his possession, so as to release it from the lien thereon for the amount of the repairs. Maxton Auto Co. v. Rudd, 176 N. C. 497, 97 S. E. 477 (1918).

Same-Sale with Warranties.-The sale. privately, of a horse on Sunday by a horse dealer, to one knowing of the calling of the seller, was held not to be such a violation by the buyer of the section as to prevent him from recovering in an action for a deceit and false warranty against the seller. Melvin v. Easley, 52 N. C. 356 (1860). Sufficiency of Indictment.—An indict-

ment charging that the defendant was a common Sabbathbreaker and profaner of the Lord's Day, commonly called Sunday was held to be insufficient. State v. Brown, 7 N. C. 224 (1819). See State v. Brooksbank, 28 N. C. 73 (1845).

Cited in Covington v. Threadgill, 88 N. C. 186 (1883); Riddle v. Whisnant, 220 N.

C. 131, 16 S. E. (2d) 698 (1941).

§ 103-2. Hunting on Sunday.—If any person shall, except in defense of his own property, hunt on Sunday, having with him a shotgun, rifle, or pistol, he shall be guilty of a misdemeanor and pay a fine not exceeding fifty dollars (\$50.00) or imprisoned not exceeding thirty days. (1868-9, c. 18, ss. 1, 2; Code, s. 3783; Rev., s. 3842; C. S., s. 3956; 1945, c. 1047.)

Local Modification. — Perquimans: 1935, c. 145.

Editor's Note.-The 1945 amendment rewrote this section. Formerly the section created two offenses: (1) Hunting on Sunday with a dog, and (2) being found off one's premises having a shotgun, rifle or pistol. State v. Howard, 67 N. C. 24 (1872).

Sufficiency of Indictment.-Under the former reading of the section, a conviction was sustainable under an indictment charging the defendant with being "found off his premises on the Sabbath day, having with him a shotgun, contrary to the form

of the statute," etc. State v. Howard, 67 N. C. 24 (1872).

Same-"Sabbath."-It is immaterial that the indictment used the expression "the Sabbath" instead of "Sunday." State v. Drake, 64 N. C. 589 (1870).

Same—Must State Act Committed on

Sunday.—An indictment for an act which is criminal when committed on Sunday, must state that the act in question was committed on Sunday; but if it does so, no exception can be taken to it for reference to the same day by a wrong day of the month. State v. Drake, 64 N. C. 589 (1870).

§ 103-3. What process executed on Sunday.—It shall not be lawful for any sheriff, constable, or other officer to execute any summons, capias, or other process on Sunday, unless the same be issued for treason, felony or misdemeanor. (1777, c. 118, s. 6; R. C., c. 31, s. 54; Code, s. 928; Rev., s. 2837; C. S., s. 3958.)

Cross Reference. - As to prohibition against arrest in civil cases on Sunday, see § 1-410.

Execution of Writ or Other Process.—It is unlawful for an officer to execute any writ or other process on Sunday. Devries & Co. v. Summit, 86 N. C. 126 (1882).

Summons in a civil action served on Sunday is invalid and does not bind defendant, and the status of the process is the same as if service had not been made. Mintz v. Frink, 217 N. C. 101, 6 S. E. (2d) 804 (1940).

A notice to take a deposition on Sunday

is not good, and a deposition taken on such notice must be rejected. Sloan v. Williford, 25 N. C. 307 (1843).

A levy of an execution on Sunday is void. Bland v. Whitfield, 46 N. C. 122 (1853).

Distress for Penalty under Revenue Act. -The sheriff may proceed on Sunday by distress to enforce the penalty authorized by a revenue act of the legislature for peddling without license. Cowles v. Brittain, 9 N. C. 204 (1822),

Sunday is not a judicial day, hence an adjournment of the court from Saturday night to Monday morning during the progress of a trial for murder is not violative of the act requiring the adjournment to be "from day to day." State v. Howard, 82

N. C. 623 (1880).

When Court May Sit on Sunday.-There have been some instances in the judicial proceedings in this State where the courts have held their sessions on Sunday, but the cases are rare, and whenever it has been done, exception has generally been taken to the course of the court, upon the ground that it could not legally sit on that day. But the Supreme Court has held that in special cases ex necessitate the court might sit on Sunday. State v. Ricketts, 74

N. C. 187 (1876); State v. McGimsey, 80 N. C. 377 (1879); State v. Howard, 82 N. C. 623 (1880).

Term of Court Embraces Sunday.-When a term of court is set by statute to begin on a certain Monday, and to last for "one week" (or two or three weeks, as the case may be), it embraces the Sunday of each week (unless sooner adjourned), and the term expires by limitation at midnight of that day. Taylor v. Ervin, 119 N. C. 274, 25 S. E. 875 (1896).

Verdict of Jury and Judgment. - The rendition by the jury of a verdict on Sunday is not invalid for that cause. Tuttle v. Tuttle, 146 N. C. 484, 59 S. E. 1008 (1907).

A verdict entered on Sunday of a week set for the duration of a court, in the absence of an earlier adjournment, is legally entered. Taylor v. Ervin, 119 N. C. 274, 26 S. E. 875 (1896).

There being no inhibition of a verdict rendered on Sunday, either at common law or by statute, a judgment entered on that day (by virtue of the statute, that it shall be entered up at once on the verdict) is valid. Taylor v. Ervin, 119 N. C. 274, 25 S. E. 875 (1896).

§ 103-4. Dates of public holidays.—The first day of January, the nineteenth day of January, the twenty-second day of February, Easter Monday, the twelfth day of April, the tenth day of May, the twentieth day of May, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, Tuesday after the first Monday in November when a general election is held, the day appointed by the Governor as a Thanksgiving Day, and the twenty-fifth day of December of each and every year, are declared to be public holidays; and whenever any such holiday shall fall upon Sunday, the Monday following shall be a public holiday: Provided, that Easter Monday and the thirtieth day of May shall be holidays for all State and national banks only. (1881, c. 294; Code, s. 3784; 1891, c. 58; 1899, c. 410; 1901, c. 25; Rev., s. 2838; 1907, c. 996; 1909, c. 888; 1919, c. 287; C. S., s. 3959; 1935, c. 212.)

Editor's Note. — The 1935 amendment inserted "Easter Monday" and the "thirtieth day of May" in this section.

Effect of Legal Holiday Generally.-The statute declaring certain days public holidays does not prohibit the pursuit of the usual avocations of citizens, nor public officers or the courts from exercising their respective functions on those days. it might be that the attendance of jurors, witnesses and suitors will not be enforced, and the courts will not sue out or enforce process on such days, yet the courts may lawfully proceed with the business before them. State v. Moore, 104 N. C. 743, 10 S. E. 183 (1889).

The section simply declares that certain days therein specified, in each year, shall be public holidays, and the following sec-

tion prescribes when papers coming due on such days, or on Sunday, shall be payable. It does not purport, in terms or effect, to prohibit persons from pursuing their usual avocations on such days, nor is there any inhibition upon public officers to exercise their offices, respectively; nor is there any inhibition upon the courts to sit on such days and exercise their functions and authority. There is no such statutory inhibition; nor, indeed, is there any, except such as may arise in the application of general principles of law. It has never been understood to be the law in this State that a public holiday is dies non juridicus, except perhaps to a limited extent; it is very certainly not wholly so. The courts, particularly the superior courts, very frequently sit on such days and hear and try

causes and dispatch the business that ordinarily comes before them, especially when there is no objection. State v. Moore, 104 N. C. 743, 10 S. E. 183 (1889).

Deposition Opened on Holiday.—A legal holiday has not the same status in respect

to legal proceedings as Sunday; and while depositions opened on the latter day are void, they are not so when they are opened on a legal holiday. Latta v. Catawba Elec. Co., 146 N. C. 285, 59 S. E. 1028 (1907).

§ 103-5. Acts to be done on Sunday or holidays.—Where the day or the last day for doing an act required or permitted by law to be done falls on Sunday or on a holiday the act may be done on the next succeeding secular or business day. (Code, ss. 3784, 3785, 3786; 1899, c. 733, s. 194; Rev., s. 2839; C. S., s. 3960.)

Cross References.—As to computing time when last day falls on Sunday, see § 1-593. As to time negotiable instrument

becoming due on Sunday is payable, see § 25-91.

Chapter 104.

United States Lands.

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ARTICLE 1.

Authority for Acquisition.

§ 104-1. Acquisition of lands for specified purposes authorized; concurrent jurisdiction reserved.—The United States is authorized, by purchase or otherwise, to acquire title to any tract or parcel of land in the State of North Carolina, not exceeding twenty-five acres, for the purpose of erecting thereon any custom house, courthouse, post office, or other building, including lighthouses, lightkeepers' dwellings, lifesaving stations, buoys and coal depots and buildings connected therewith, or for the establishment of a fish-cultural station and the erection thereon of such buildings and improvements as may be necessary for the successful operations of such fish-cultural station. The consent to acquisition by the United States is upon the express condition that the State of North Carolina shall so far retain a concurrent jurisdiction with the United States over such lands as that all civil and criminal process issued from the courts of the State of North Carolina may be executed thereon in like manner as if this authority had not been given, and that the State of North Carolina also retains authority to punish all violations of its criminal laws committed on any such tract

of land. (1870-1, c. 44, s. 5; Code, ss. 3080, 3083; 1887, c. 136; 1899, c. 10; Rev., s. 5426; C. S., s. 8053.)

Editor's Note.—As to note on jurisdiction relative to lands acquired by federal government, see 23 N. C. Law Rev. 258.

Exclusive Jurisdiction. — Jurisdiction of the United States is exclusive over property in this State acquired in 1899 with the

State's legislative consent, and such exclusive jurisdiction is not affected by the restrictive provisions of this section and § 104-7 subsequently enacted, which are prospective only. State v. DeBerry, 224 N. C. 834, 32 S. E. (2d) 617 (1945).

- § 104-2. Unused lands to revert to State. The consent given in § 104-1 is upon consideration of the United States building lighthouses, lighthousekeepers' dwellings, lifesaving stations, buovs, coal depots, fish stations, post offices, custom houses, and other buildings connected therewith, on the tracts or parcels of land so purchased, or that may be purchased; and that the title to land so conveyed to the United States shall revert to the State unless the construction of the afore-mentioned buildings be completed thereon within ten years from the date of the conveyance from the grantor. (1870-1, c. 44, s. 5; Code, ss. 3080, 3083; 1887, c. 136; 1899, c. 10; Rev., s. 5426; C. S., s. 8054.)
- § 104-3. Exemption of such lands from taxation.—The lots, parcels, or tracts of land acquired under this chapter, together with the tenements and appurtenances for the purpose mentioned in this chapter, shall be exempt from taxation. (1870-1, c. 44, s. 3; Code, s. 3082; Rev., s. 5428; C. S., s. 8055.)

convey lands to the United States government reservation, under the federal statute, does not vest the title in the government until survey made, acreage determined, purchase price paid, or conveyance made

When Exemption Begins.—A contract to and title approved by the Attorney General, and until then the land is subject to State taxes under the State statutes. Caldwell Land, etc., Co. v. Commissioners, 174 N. C. 634, 94 S. E. 406 (1917).

- § 104-4. Conveyances of such lands to be recorded.—All deeds, conveyances, or other title papers for the same shall be recorded, as in other cases, in the office of the register of deeds of the county in which the lands so conveyed may lie, in the same manner and under the same regulations as other deeds and conveyances are now recorded, and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or legal division of any public land belonging to the United States, which may be set apart by the general government for the purpose before mentioned, by an order, patent, or other official document or paper so describing such land. (1870-1, c. 44, s. 2; 1872-3, c. 201; Code, s. 3081; Rev., s. 5429; C. S., s. 8056.)
- § 104-5. Forest reserve in North Carolina authorized; powers conferred.—The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, except as hereinafter provided, such lands in North Carolina as in the opinion of the federal government may be needed for the establishment of a national forest reserve in that region. This consent is given upon condition that the State of North Carolina shall retain a concurrent iurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. Power is hereby conferred upon the Congress of the United States to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in such national forest reserve such forest-covered lands lying in North Carolina as in the opinion of the federal government may be needed for this purpose, but as much as two hundred acres of any tract of land occupied as a home by bona fide residents in this State on the eighteenth day of January, one thousand nine hundred and one, shall be exempt from the provisions of this section. Power is hereby conferred upon Con-

gress to pass such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature, and to provide punishment therefor, as in its judgment may be necessary for the management, control, and protection of such lands as may be from time to time acquired by the United States under the provisions of this section. (1901, c. 17; Rev., s. 5430; C. S., s. 8057; 1929, c. 67, s. 1.)

Editor's Note. — The 1929 amendment appearing in this section, and inserted struck out the word "Western" formerly "North" in the title.

- § 104-6. Acquisition of lands for river and harbor improvement; reservation of right to serve process.—The consent of the legislature of the State is hereby given to the acquisition by the United States of any tracts, pieces, or parcels of land within the limits of the State, by purchase or condemnation, for use as sites for locks and dams, or for any other purpose in connection with the improvement of rivers and harbors within and on the borders of the State. The consent hereby given is in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of Congress in such cases made and provided; and this State retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this section, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired, or the buildings or structures thereon erected. (1907, c. 681; C. S., s. 8058.)
- § 104-7. Acquisition of lands for public buildings; cession of jurisdiction; exemption from taxation.—The consent of the State is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in the State required for the sites for custom houses, courthouses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the government.

Exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands. The jurisdiction ceded shall not vest until the United States shall have acquired title to said lands by purchase, condemnation, or other-

wise

So long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this State. (1907, c. 25; C. S., s. 8059.)

Cross Reference.—See note to § 104-1.

Editor's Note.—As to note on jurisdicgovernment, see 23 N. C. Law Rev. 258.

- § 104-8. Further authorization of acquisition of land.—The United States is hereby authorized to acquire lands by condemnation or otherwise in this State for the purpose of preserving the navigability of navigable streams and for holding and administering such lands for national park purposes: Provided, that this section and § 104-9 shall in nowise affect the authority conferred upon the United States and reserved to the State in §§ 104-5 and 104-6. (1925, c. 152, s. 1.)
- § 104-9. Condition of consent granted in preceding section.—This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of

any crime, without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. (1925, c. 152, s. 2.)

- § 104-10. Migratory bird sanctuaries or other wild life refuges.— The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, such lands in North Carolina as in the opinion of the federal government may be needed for the establishment of one or more migratory bird sanctuaries or other wild life refuges. This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed therein in like manner as if this consent had not been given. Power is hereby conferred upon the Congress of the United States to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in such sanctuaries or refuges such lands lying in North Carolina as in the opinion of the federal government may be suitable and needed for this purpose. Power is hereby conferred upon Congress to pass such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature, and to provide punishment therefor, as in its judgment may be necessary for the management, control and protection of such lands as may be from time to time acquired by the United States under the provisions of this section. (1929, c. 163, s. 1.)
- § 104-11. Utilities Commission to secure rights-of-way, etc., for waterway improvements by use of federal funds. Hereafter whenever any waterway improvement in North Carolina by the use of federal funds is provided for upon condition that the State or locality shall furnish rights-of-way, permits for the dumping of dredged material, or furnish or do any other thing in connection with the proposed waterway improvement, the Utilities Commission is authorized and empowered to represent the State or locality in such matter of securing the rights-of-way, permits for the dumping of dredged material, or other things so required in connection with such waterway improvement; and in prosecuting such undertaking, the Utilities Commission may follow the same procedure provided in article two for the acquisition of rights-of-way for the intercoastal waterway from the Cape Fear River to the South Carolina line: Provided, however, that said Utilities Commission is not hereby authorized to enter into obligation or contract for the payment of any money or proceeds through condemnation or otherwise without the express approval of the Governor and Council of State. (1935, c. 240; 1937, c. 434.)

ARTICLE 2.

Inland Waterways.

§ 104-12. Acquisition of land for inland waterway from Cape Fear River; grant of State lands.—For the purpose of aiding in the construction of the proposed inland waterway by the United States from the Cape Fear River at Southport to the North Carolina-South Carolina State line, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within said inland waterway, right-of-way, which is to be one thousand feet to seventeen hundred fifty feet wide in so far as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official, exercising control over the construction of the said waterway. Whenever in the construction of such inland waterway within this State, lands theretofore submerged shall be raised above the water by the

deposit of excavated material, the land so formed shall become the property of the United States if within the limits of said inland waterway, right-of-way, herein set out one thousand feet to seventeen hundred fifty feet and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the limits above specified, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States, as above provided. If said lands so required for the inland waterway right-of-way shall be marshlands, or sound lands, the title to which has here-tofore been vested in the State Board of Education, the Governor of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute proper conveyance to the United States of America for said marshlands or sound lands, free of cost, both to the State and to the United States government, upon a certificate furnished to said Board of Education by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official exercising control over the construction of the said inland waterway. (1931, c. 2, s. 1.)

§ 104-13. Utilities Commission to secure right-of-way over private lands; condemnation by United States .- If the title to any part of the lands acquired by the United States government for the construction of such inland waterway from the Cape Fear River at Southport to the North Carolina-South Carolina State line shall be in any private person, company or corporation, railroad company, street railway company, telephone or telegraph company, or other public service corporation or shall have been donated or condemned for any public use by any political subdivision of the State, or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, then the Utilities Commission, in the name of the State of North Carolina, is hereby authorized and empowered, acting for and in behalf of the State of North Carolina, to secure a right-of-way one thousand to seventeen hundred fifty feet wide for said inland waterway across and through such lands or any part thereof, by purchase, donation or otherwise, through agreement with the owner or owners where possible, and when any such property is thus acquired, the Governor and Secretary of State shall execute a deed for the same to the United States; and if for any reason the said Commission shall be unable to secure such right-of-way across any such property by voluntary donation by and/ or with the owner or owners, the said Commission acting for and in behalf of the State of North Carolina is hereby vested with the power to condemn the same, and in so doing, the ways, means, methods and procedure of the chapter of the General Statutes of North Carolina, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this article, and in all instances, the general and special benefits to the owner thereof shall be assessed as offsets against the damages to such property or lands.

As such condemnation proceedings might result in delay in the acquiring of title to all parts of the right-of-way and in the construction of the said inland waterway by the United States, said Utilities Commission is authorized to enter any of said lands and property and take possession of the same at the time hereinafter provided as needed for this use in behalf of the State or the United States government for the purposes herein set out, prior to the bringing of the proceeding for condemnation and prior to the payment of the money for such land or property under any judgment in condemnation. In the event the owner or owners shall appeal from the report of the commissioners appointed in any condemnation proceeding hereunder, it shall not be necessary for said Commission, acting in behalf of the State of North Carolina, or the United States government, to deposit the money assessed by said commissioners with the clerk.

Whenever proceedings in condemnation are instituted in pursuance of the provisions of this section, the said Commission upon the filing of the petition or petitions in such proceedings, shall have the right to take immediate possession, on behalf of the State, of such lands or property to the extent of the interest to be acquired and the order of the clerk of the superior court of the county where the action is instituted, shall be sufficient to vest the title and possession in the State through the Utilities Commission. The Governor and Secretary of State shall, upon vesting of the title and possession, execute a deed to the United States and said lands or property may then be appropriated and used by the United States for the purposes aforesaid: Provided, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation, if any, to which the owners of the property are entitled may be ascertained and when so ascertained and determined, such compensation, if any, shall be promptly paid as hereinafter in this article provided.

If the United States government shall so determine, it is hereby authorized to condemn and use all lands and property which may be needed for the purposes herein set out and which is specifically described and set out in the paragraph next preceding, under the authority of said United States government, and according to the provisions existing in the federal statutes for condemning lands and property for the use of the United States government. In case the United States government shall so condemn said land and property, the said Utilities Commission is hereby authorized to pay all expenses of the condemnation proceedings and any award that may be made thereunder, out of the money which

may be appropriated for said purposes.

All sums which may be agreed upon between the said Utilities Commission and the owner of any property needed by the United States government for said inland waterway and all sums which may be assessed in favor of the owner of any property condemned hereunder, shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full, but the order of the clerk when entered in any condemnation proceeding shall divest the owner of the land condemned of all right, title, interest and possession in and to such land and property. (1931, c. 2, s. 2; 1937, c. 434.)

- § 104-14. Use declared paramount public purpose.—In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, a street railway company, telephone or telegraph company, or other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, or by any other act dedicated to any public use, shall in no way affect the right of the State of North Carolina, or the United States government, to proceed and condemn such land and property as hereinbefore provided. (1931, c. 2, s. 3.)
- § 104-15. Method of payment of expenses and awards.—Whenever said Commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said Commission is hereby authorized and directed to pay all of said sums and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1931, c. 2, s. 4.)
- § 104-16. State and United States may enter upon lands for survey, etc.—For the purpose of determining the lands necessary for the uses herein

set out, the Utilities Commission or the United States government, or the agents of either, shall have the right to enter upon any lands along the general line of the right-of-way in this article specified, and make such surveys, and do such other acts as in their judgment may be necessary for the purpose of definitely locating the specific lines of said right-of-way and the lands required for said purposes, and there shall be no claim against the State of North Carolina or the United States for such acts as may be done in making said surveys. (1931, c. 2, s. 5; 1937, c. 434.)

- § 104-17. Maintenance of bridges over waterway.—The State Highway and Public Works Commission or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to construct, maintain and operate in perpetuity, all bridges over the waterway without cost to the United States. (1931, c. 2, s. 7; 1933, c. 172, s. 17.)
- § 104-18. Concurrent jurisdiction over waterway.—The State of North Carolina retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1931, c. 2, s. 8.)
- § 104-19. Acquisition of land for inland waterway from Beaufort Inlet; grant of State lands.—For the purpose of aiding in the construction of the proposed inland waterway by the United States from Beaufort Inlet in the State of North Carolina to the Cape Fear River, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within said inland waterway, right-of-way, which is to be one thousand feet wide, in so far as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official, exercising control over the construction of the said waterway. Whenever in the construction of such inland waterway within this State, lands theretofore submerged shall be raised above the water by the deposit of excavated material, the land so formed shall become the property of the United States if within the limits of said inland waterway, right-of-way, herein set out one thousand feet, and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the limits above specified, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States, as above provided. If said lands so required for the inland waterway right-of-way shall be marshlands, the title to which has heretofore been vested in the State Board of Education, the Governor of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute a proper conveyance to the United States of America for said marshlands, free of cost, both to the State and to the United States government, upon a certificate furnished to said Board of Education by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official exercising control over the construction of the said inland waterway. (1927, c. 44, s. 1.)
- § 104-20. Utilities Commission to secure right-of-way; condemnation by United States.—If the title to any part of the lands required by the United States government for the construction of such inland waterway from Beaufort Inlet to the Cape Fear River shall be in any private person, company or corporation, railroad company, street railway company, telephone or telegraph

company, or other public service corporation, or shall have been donated or condemned for any public use by any political subdivision of the State or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education. then the Utilities Commission in the name of the State of North Carolina, is hereby authorized and empowered, acting for and in behalf of the State of North Carolina, to secure a right-of-way one thousand feet wide for said inland waterway across and through such lands or any part thereof, if possible by purchase, donation or otherwise, through agreement with the owner or owners, and when any such property is thus acquired, the Governor and Secretary of State shall execute a deed for the same to the United States; and if for any reason the said Commission shall be unable to secure such right-of-way across any such property by voluntary agreement with the owner or owners as aforesaid, the said Commission acting for and in behalf of the State of North Carolina, is hereby vested with the power to condemn the same, and in so doing, the ways, means, methods and procedure of chapter forty of the General Statutes of North Carolina, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this law, and in all instances, the general and the special benefits to the owner thereof shall be assessed as offsets against the damages to such property or lands.

As such condemnation proceedings might result in delay in the acquiring of title to all parts of the right-of-way and in the construction of the said inland waterway by the United States, said Utilities Commission is authorized to enter any of said lands and property and take possession of the same at the time hereinafter provided as needed for this use in behalf of the State or the United States government for the purposes herein set out prior to the bringing of the proceeding for condemnation and prior to the payment of the money for such land or property under any judgment in condemnation. In the event the owner or owners shall appeal from the report of the commissioners appointed in the condemnation proceeding it shall not be necessary for said Commission, acting in behalf of the State of North Carolina, the State of North Carolina, or the United States government, to deposit the money assessed by said commissioners with the clerk.

Whenever proceedings in condemnation are instituted in pursuance of the provisions of this section, the said Commission upon the filing of the petition or petitions in such proceedings, shall have the right to take immediate possession on behalf of the State of such lands or property to the extent of the interest to be acquired and the Governor and Secretary of State shall thereupon execute a deed to the United States and said lands or property may then be appropriated and used by the United States for the purposes aforesaid. Provided, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation to which the owners of the property are entitled may be ascertained and when so ascertained and determined such compensation shall be promptly paid as hereinafter in this law provided.

If the United States government shall so determine, it is hereby authorized to condemn and use all lands and property which may be needed for the purposes herein set out and which is specifically described and set out in the preceding paragraphs, under the authority of said United States government, and according to the provisions existing in the federal statutes for condemning lands and property for the use of the United States government. In case the United States government shall so condemn said land and property, the said Utilities Commission is hereby authorized to pay all expenses of the condemnation proceedings and any award that may be made thereunder, out of the money which may be appropriated for said purposes. (1927, c. 44, s. 2; 1929, c. 4; c. 7, s. 1; 1937, c. 434.)

- § 104-21. Use declared paramount public purpose. In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, street railway company, telephone or telegraph company, or other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, shall in no way affect the right of the State of North Carolina, or the United States government, to proceed and condemn such land and property as hereinbefore provided. (1927, c. 44, s. 3.)
- § 104-22. Method of payment of expenses and awards.—Whenever said Commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said Commission is hereby authorized and directed to pay all of said sums and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1927, c. 44, s. 4.)
- § 104-23. Maintenance of bridges over waterway.—The State Highway and Public Works Commission or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to take over and maintain and operate in perpetuity, by contract with the United States government, if necessary, or otherwise, any bridge or bridges which may be subject to their respective control and which the United States government may construct across said inland waterway. (1927, c. 44, s. 6; 1929, c. 4; c. 7, s. 2.)
- § 104-24. Concurrent jurisdiction over waterway. The State of North Carolina retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1927, c. 44, s. 7.)
- § 104-25. Lands conveyed to United States for inland waterway.—For the purpose of aiding in the construction of a proposed inland waterway by the United States from the city of Norfolk, in the State of Virginia, to Beaufort Inlet, in the State of North Carolina, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within a distance of one thousand feet on either side of the center of the said inland waterway, in so far as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official, exercising control of the construction of the said waterway.

Wherever, in the construction of the said inland waterway, lands theretofore submerged shall be raised above the water by deposit of excavated material, the lands so formed shall become the property of the United States for a distance of one thousand feet on either side of the center of such canal or channel, and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the distance above mentioned, the grant to issue upon a certificate furnished to the Secretary of State by some authorized

official of the United States as above provided. (1913, c. 197; C. S., s. 7583; 1937, c. 445.)

Editor's Note. — The 1937 amendment struck out the words "or in the improvement of any other waterway within this State" formerly appearing after the word "waterway" in the second paragraph.

Division XV. Taxation.



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Taxation.

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SUBCHAPTER I. LEVY OF TAXES.

105-1. Title and purpose of subchapter.—The title of this subchapter shall be "The Revenue Act." The purpose of this subchapter shall be to raise and provide revenue for the necessary uses and purposes of the government and State of North Carolina during the next biennium and each biennium thereafter, and the provisions of this subchapter shall be and remain in full force and effect until changed by law. (1939, c. 158, ss. A, B; 1941, c. 50, s. 1.)

Editor's Note. — The 1941 amendment see 15 N. C. Law Rev. 387. added the clause relating to remaining in force until changed by law.

Taxing Power of General Assembly.-The General Assembly has an unlimited For article discussing this subchapter, right to tax all persons domiciled within

the State, and all property within the State, except so far as this right has been limited by the provisions of the Constitution, either expressly or by necessary implication. Pullen v. Commissioners, 66 N. C. 361 (1872).

Same—Delegation of Power.—The legislature may authorize a municipal corporation to lay taxes on the town property, the persons, and the subject of taxation incident to the persons, of those who have a business residence in town, though they have a residence also out of town. Worth v. Commissioners, 60 N. C. 617 (1864).

Constitutional Provisions — Uniformity Required. — Under North Carolina Const. Art. V, § 3, the same rule of uniformity applies to the taxing of "trades, professions,

franchises and incomes" as to the other species of property therein named; and there must also be uniformity in the mode of assessment. Worth v. Petersburg R. Co., 89 N. C. 301 (1883). Uniformity, in its legal and proper sense, is inseparably incident to the power of taxation, whether applied to taxes on property or to those imposed on trades, professions, etc. State v. Moore, 113 N. C. 697, 18 S. E. 342 (1893).

Same—Statement of Object.—The North Carolina Const. Art. V, § 7, requires that every act levying taxes shall state the objects to which they shall be appropriated. This provision, however, has no application to taxes levied by county authorities for county purposes. Parker v. Commissioners, 104 N. C. 166, 10 S. E. 137 (1889).

ARTICLE 1.

Schedule A. Inheritance Tax.

§ 105-2. General provisions.—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, in the following cases:

First. When the transfer is by will or by the intestate laws of this State from any person dying, seized or possessed of the property while a resident of the State.

Second. When the transfer is by will or intestate laws of this or any other state of real property or goods, wares, and merchandise within this State, or of any property, real, personal, or mixed, tangible or intangible, over which the State of North Carolina has a taxing jurisdiction, including State and municipal bonds, and the decedent was a resident of the State at the time of death; when the transfer is of real property or intangible personal property within the State, or intangible personal property that has acquired a situs in this State, and the decedent was a nonresident of the State at the time of death.

Third. When the transfer of property made by a resident, or nonresident, is of real property within this State, or of goods, wares and merchandise within this State, or of any other property, real, personal, or mixed, tangible or intangible, over which the State of North Carolina has taxing jurisdiction, including State and municipal bonds, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, including a transfer under which the transferor has retained for his life or any period not ending before his death (a) the possession or enjoyment of, or the income from, the property or (b) the right to designate the persons who shall possess or enjoy the property or the income therefrom. Every transfer by deed, grant, bargain, sale, or gift, made within three years prior to the death of the grantor, vendor, or donor, exceeding three per cent (3%) of his or her estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall, in the absence of proof to the contrary, be deemed to have been made in contemplation of death within the meaning of this section.

Fourth. When any person or corporation comes into possession or enjoyment, by a transfer from a resident, or from a nonresident decedent when such nonresident decedent's property consists of real property within this State or tangible personal property within the State, or intangible personal property that

has acquired a situs in this State, of an estate in expectancy of any kind or character which is contingent or defeasible, transferred by any instrument taking effect after March 24, 1939, or of any property transferred pursuant to a

power of appointment contained in any instrument.

Fifth. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this article, such appointment when made shall be deemed a transfer taxable under the provisions of this article, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation having such power of appointment so derived shall, for any reason whatever, omit or fail to exercise the same, in whole or in part, or where for any reason the said power has not been exercised, a transfer taxable under the provisions of this article shall be deemed to take place, to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by will of the donee of the power failing to exercise the same, taking effect at the time of such omission or failure.

Sixth. Whenever any real or personal property, or both, of whatever kind or nature, tangible or intangible, is disposed of by will or by deed to any person or persons for life, or the life of the survivor, or for a term of years, or to any corporation for a term of years, with the power of appointment in such person or persons, or in such corporation, or reserving to the grantor or devisor the power of revocation, the tax, upon the death of the person making such will or deed, shall, on the whole amount of property so disposed of, be due and payable as in other cases, and the said tax shall be computed according to the

relationship of the first donee or devisee to the devisor.

Seventh. Where real property is held by husband and wife as tenants by the entirety, the surviving tenant shall be taxable on one-half of the value of such property.

Eighth. Where the proceeds of life insurance policies are payable as provided

in § 105-13.

However, nothing in this article shall be construed as imposing a tax upon any transfer of intangibles not having a commercial or business situs in this State, by a person, or by reason of the death of a person, who was not a resident of this State at the time of his death, and, if held or transferred in trust, such intangibles shall not be deemed to have a commercial or business situs in this State merely because the trustee is a resident or, if a corporation, is doing business in this State, unless the same be employed in or held or used in connection with some business carried on in whole or in part in this State. (1939, c. 158, s. 1; 1941, c. 50, s. 2; 1943, c. 400, s. 1.)

Editor's Note. — The 1941 amendment made changes in subsections First and Second and added the last paragraph to the section. The 1943 amendment inserted

subsection Eighth.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 526. For comment on changes in the inheritance tax law made by the 1947 General Assembly, see 25 N. C. Law Rev. 470. For note on trust as device to escape inheritance taxes, see 12 N. C. Law Rev. 180. For article on planning for North Carolina death and gift taxes, see 27 N. C. Law Rev. 114. For

history of inheritance tax statute, see State v. Scales, 172 N. C. 915, 90 S. E. 439 (1916).

Many of the cases in the notes to this and the following sections are constructions of the corresponding provisions (§ 7772 et seq.) of the Consolidated Statutes and of subsequent revenue laws.

Liberal Construction. — A liberal construction will be given to inheritance tax statutes to the end that all property fairly and reasonably coming within their provision may be taxed. State v. Scales, 172 N. C. 915, 90 S. E. 439 (1916). See also, Norris v. Durfey, 168 N. C. 321, 84 S. E. 687

(1915); Reynolds v. Reynolds, 208 N. C. 578, 182 S. E. 341 (1935).

Under this liberal construction in favor of the government, every transfer of property that could be reasonably brought within the purview of the law has been subjected to taxation. Norris v. Durfey, 168 N. C. 321, 84 S. E. 687 (1915).

Whole Revenue Act Construed in Pari Materia.—The whole Revenue Act of 1939 and all of its parts are to be considered in pari materia, and construed accordingly. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

Basis of Inheritance Tax. — The theory on which taxation on the devolution of estates is based and its legality upheld is clearly established and is founded upon two principles: (1) A succession tax is a tax on the right of succession to property, and not on the property itself. (2) The right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law. In re Morris Estate, 138 N. C. 259, 50 S. E. 682 (1905). See Waddell v. Doughton, 194 N. C. 537, 140 S. E. 160 (1927).

The Revenue Act reflects the same philosophy which underlies the statutes of descent and distribution. It recognizes in the decedent the privilege of disposition of his property; and, if not the moral and social obligations which rest upon him with respect to its exercise, yet, indeed, the fitness of his provision for those more closely related to him by consanguinity or marital ties. This privilege may be exercised either by testamentary disposition or by leaving his property to be distributed under the law. Valentine v. Gill, 223 N. C. 356, 27 S. E. (2d) 2 (1943).

Situs for Taxation.—The personal property of a decedent, whatever its character and wherever located, is subject to an inheritance tax in the state in which its owner was a resident at the time of his death. This position is upheld upon the principle that the situs of personal property, for the purpose of taxation, is said to be in the state where the owner resides and has his domicile. Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 121 S. E. 741 (1924), reversed on other grounds in 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A. L. R. 1374 (1926).

Thus, if the testator or intestate had his domicile abroad and his personal estate also, no tax would be demanded of the legatee or next of kin, though they might be resident in the State. State v. Brim, 57 N. C. 300 (1858). After the legacy or dis-

tributive share has been received, it then becomes a part of the property of one of the citizens of the State, and then it may be taxed in common with any other property of the like kind. Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 121 S. E. 741 (1924), reversed on other grounds in 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A. L. R. 1374 (1926).

Same-Former Law Invalid in Part .-Under the provisions of the prior law an inheritance or transfer tax was imposed upon the right of nonresident legatees or distributees to take by will or to receive, under the intestate laws of another state, from a nonresident testator or intestate, shares of stock in a foreign corporation having a stated proportion of its property located within this State and conducting its business here. This provision was held invalid upon the principle that the subject to be taxed must be within the jurisdiction of the state assessing and collecting the tax, and that this principle applies as well in the case of a transfer tax as in that of a property tax. Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A. L. R. 1374 (1926), reversing 187 N. C. 263, 121 S. E. 741 (1924), discussed in 3 N. C. Law Rev. 107. See Rotan v. State, 195 N. C. 291, 141 S. E. 733 (1928).

Transfer Necessary.—The thing taxed is the privilege of transferring, and it is essential that there shall be a transfer, within the meaning of this section, from decedent to the beneficiary by reason of death. There must be a transfer of something before there can be a tax upon its transfer, and where the decedent had no interest in or control over a life insurance policy which could be transferred by his death its proceeds are not subject to this article. Wachovia Bank, etc., Co. v. Maxwell, 221 N. C. 528, 20 S. E. (2d) 840 (1942). See § 105-13.

Kind of Property Transferred Is Immaterial.—The right to impose an inheritance tax does not depend upon the kind of property transferred. In re Morris Estate, 138 N. C. 259, 50 S. E. 682 (1905).

A widow's dower and year's allowance allotted to her upon her dissent from her husband's will is property passing by will or by intestate laws within the meaning of this statute. State v. Dunn, 174 N. C. 679, 94 S. E. 481 (1917).

Interest Subject to Appointment of Third Person. — The corresponding section of the prior law included and laid a tax upon an interest made subject by will to

the appointment of a third person. In re Inheritance Tax, 172 N. C. 170, 90 S. E.

203 (1916).

Death of Beneficiary of Testamentary Trust.—Under the provisions of a will, the entire beneficial interest in the estate vested in testator's three sons upon testator's death with the right of full enjoyment postponed until the termination of the trust. One of the sons died during minority, prior to the termination of the trust, leaving his two brothers as his sole heirs at law. It was held that the surviving brothers took the deceased brother's interest under the laws of descent and distribution, and the

estate so inherited was subject to the appropriate State and federal inheritance taxes and was encumbered by the lien for such taxes. Coddington v. Stone, 217 N. C. 714, 9 S. E. (2d) 420 (1940).

Settlement of Taxes by Compromise. The settlement of taxes by compromise, in a court of competent jurisdiction, in view of the bona fide controversies between the parties, and the facts and circumstances of the case, was affirmed on appeal, the matter being a legitimate subject of compro-mise and all parties affected being duly represented. Reynolds v. Reynolds, 208 N. C. 578, 182 S. E. 341 (1935).

§ 105-3. Property exempt.—The following property shall be exempt from taxation under this article:

(a) Property passing to or for the use of the State of North Carolina, or to or for the use of municipal corporations within the State or other political subdivisions thereof, for exclusively public purposes.

(b) Property passing to religious, charitable, or educational corporations, or to churches, hospitals, orphan asylums, public libraries, religious, benevolent, or charitable organizations, or passing to any trustee or trustees for religious, benevolent, or charitable purposes, where such religious, charitable, or educational institutions, corporations, churches, trusts, etc., are located within the State and not conducted

for profit.

(c) Property passing to religious, educational, or charitable corporations, foundations or trusts, not conducted for profit, incorporated or created or administered under the laws of any other state: If such other state levies no inheritance or estate taxes on property similarly passing from residents of such state to religious, educational or charitable corporations, foundations or trusts incorporated or created or administered under the laws of this State; or if such corporation, foundation or trust is one receiving and disbursing funds donated in this State for reli-

gious, educational or charitable purposes.

(d) The amount of twenty thousand dollars (\$20,000.00), only, of the total proceeds of life insurance policies, when such policy or policies are payable to a beneficiary or beneficiaries named in such policy or policies, and such beneficiary or beneficiaries are any such person or persons as are designated in § 105-4, subsection (a); and the amount of two thousand dollars (\$2,000.00) only, of the total proceeds of life insurance policies, when such policy or policies are payable to a beneficiary or beneficiaries named in such policy or policies, and such beneficiary or beneficiaries are any person or persons as are designated in §§ 105-5 and 105-6. Provided, that no more than the amounts so specified of any such policy or policies shall be exempt from taxation, whether in favor of one beneficiary or more, and the exemption thus provided shall be prorated between the beneficiaries in proportion to the amounts received under the policies, unless otherwise provided by the decedent; provided further, that the exemption herein provided in the sum of two thousand dollars (\$2,000.00) as to insurance policies payable to beneficiaries designated in §§ 105-5 and 105-6 shall be allowed only to the extent that such amount is not allowed as to insurance policies payable to beneficiaries designated in § 105-4, subsection (a), it being the intention to grant an exemption as to policies payable to Class B and Class C beneficiaries only in those cases where the exemption allowed as to Class A beneficiaries is less than two thousand dollars (\$2,000.00). And also proceeds of all life insurance policies payable to beneficiaries named in subsections (a), (b), and (c) of this section. And also proceeds of all policies of insurance and the proceeds of all adjusted service certificates that have been or may be paid by the United States government, or that have been or

may be paid on account of policies required to be carried by the United States government or any agency thereof, to the estate, beneficiary, or beneficiaries of any person who has served in the armed forces of the United States or in the merchant marine during the first or second World War; and proceeds, not exceeding the sum of ten thousand dollars (\$10,000.00), of all policies of insurance paid to the estate, beneficiary or beneficiaries of any person whose death was caused by enemy action during the second World War. This provision will be operative only when satisfactory proof that the death was caused by enemy action is filed by the executor, administrator or beneficiary with the Commissioner of Revenue. (1939, c. 158, s. 2; 1943, c. 400, s. 1; 1947, c. 501, s. 1.)

Editor's Note. — The 1943 amendment added the last sentence, and rewrote the next to the last sentence, of subsection (d). And the 1947 amendment rewrote the other parts of the subsection.

For comment on exemption of property passing to foreign eleemosynary organiza-

tions, see 17 N. C. Law Rev. 381.

Exemptions Strictly Construed. —
Exemptions of property from taxation are
to be strictly construed. Benson v. Johnston County, 209 N. C. 751, 185 S. E. 6
(1936).

Municipal property is liable for county taxes where it is not used by the municipality for a governmental purpose, and therefore does not come within the constitutional provision for the exemption of property from taxation (N. C. Const. Art.

V, § 5), or within the scope of this section enacted pursuant thereto. Benson v. Johnston County, 209 N. C. 751, 185 S. E. 6 (1936).

Municipal Property Held for Business Purposes. — Property was held subject to taxation by the county in which the property is situate, although owned by a municipal corporation, where the property was held by the municipal corporation purely for business purposes and not for any governmental or necessary public purpose. Board of Financial Control v. Henderson County, 208 N. C. 569, 181 S. E. 636, 101 A. L. R. 783 (1935).

Applied in Nash v. Tarboro, 227 N. C. 283, 42 S. E. (2d) 209 (1947).

Cited in Weaverville v. Hobbs, 212 N. C. 684, 194 S. E. 860 (1938).

§ 105-4. Rate of tax—Class A.—(a) Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue, or lineal ancestor, or husband or wife of the person who died possessed of such property aforesaid, or stepchild of the person who died possessed of such property aforesaid, or child adopted by the decedent in conformity with the laws of this State or of any of the United States, or of any foreign kingdom or nation, at the following rates of tax (for each one hundred dollars (\$100.00) or fraction thereof) of the value of such interest:

First \$ 10,000	above exemption	1 per cent
	and to \$ 25,000	2 per cent
Over \$ 25,000	and to \$ 50,000	3 per cent
Over \$ 50,000	and to \$ 100,000	4 per cent
	and to \$ 200,000	5 per cent
	and to \$ 500,000	6 per cent
	and to \$1,000,000	7 per cent
	and to \$1,500,000	8 per cent
	and to \$2,000,000	9 per cent
	and to \$2,500,000	
	and to \$3,000,000	
Over \$3,000,000		12 per cent

(b) The persons mentioned in this class shall be entitled to the following exemptions: Widows, ten thousand dollars (\$10,000.00); each child under twenty-one years of age, five thousand dollars (\$5,000.00); all other beneficiaries mentioned in this section, two thousand dollars (\$2,000.00) each: Provided, a grandchild or grandchildren shall be allowed the single exemption or pro rata part of the exemption of the parent, when the parent of any one grandchild or group of grandchildren is deceased or when the parent is living and does not share in the estate: Provided, that any part of the exemption not applied to the share of the parent

may be applied to the share of a grandchild or group of grandchildren of such parent. The same rule shall apply to the taking under a will, and also in case of a specific legacy or devise: Provided, that when any person shall die leaving a widow and child or children under twenty-one years of age, and leaving all or substantially all of his property by will to his wife, the wife shall be allowed an additional exemption of five thousand dollars (\$5,000.00) for each child under twenty-one years of age. (1939, c. 158, s. 3.)

Cross Reference. - As to kinds of property contemplated by this section, see § 105-2.

Real property, as well as personal, is included in this section. Norris v. Durfey, 168 N. C. 321, 84 S. E. 687 (1915).

Interest under Discretionary Control of Another Taxable. - The interest acquired by the child of testator is taxable and does not escape by reason of the fact that the testator placed it under the discretionary control and disposition of its mother. In re Inheritance Tax, 172 N. C. 170, 90 S. E. 203 (1916).

Categories of Relationship Named Are Inclusive and Exclusive. - The categories of relationship named in this and the following section are stated with that preci-

sion which is necessary to a taxing measure, and are both inclusive and exclusive, and are controlling in applying the exemption in § 105-14. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

Exemption in § 105-14.—The inheritance tax of the 1939 Revenue Act is not a tax on the property, but on the transfer of the property; and, while there must be an identity of the property, which is the subject of the transfer and claimed to be recurrently taxed, to qualify for the exemption provided in § 105-14, the exemption is allowed only to the transferees as set out in this and the following section. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

§ 105-5. Rate of tax-Class B. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or descendant of the brother or sister, or shall be the uncle or aunt by blood of the person who died possessed as aforesaid, at the following rates of tax (for each one hundred dollars (\$100.00) or fraction thereof) of the value of such interest:

First \$	5.000											Δ	ner	cent
Over \$	5.000	and to	\$	10,000	 • • •	 	• • •	• • •	• •	• •	 	 		cent
Over \$		and to		25,000	 	 					 	 		
Over \$														cent
				50,000	 	 					 	 . 7	per	cent
Over \$				100,000	 	 					 	 . 8	per	cent
Over \$	100,000	and to	\$	250,000										cent
Over \$														cent
Over \$														
														cent
Over \$1,6	000,000	and to	\$1	,500,000	 	 					 	 . 13	per	cent
Over \$1,	500,000	and to	\$2	000,000	 	 					 	 . 14	per	cent
Over \$2,	000,000	and to	\$3	.000.000										cent
Over \$3,0					 	 					 	 16	per	CCIIC
					 	 					 * *	 . 10	per	cent
(1939, c.	158, s. 4	1.)												

Cross Reference.—See note to § 105-4.

105-6. Rate of tax—Class C.—Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of relationship or collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the following rates of tax (for each one hundred dollars (\$100.00) or fraction thereof) of the value of such interest:

First \$ 10,000	8 per cent
Over \$ 10,000 and to \$ 25,000	9 per cent
Over \$ 25,000 and to \$ 50,000	10 per cent
Over \$ 50,000 and to \$ 100,000	11 per cent
Over \$ 100,000 and to \$ 250,000	12 per cent

Over	\$	250,000	and	to	\$	500	0,000) ,	 	 		 		 	 	 	 . 1	3	per	cent
Over	\$	500,000	and	to	\$1	,000),000) ,	 	 		 		 	 	 	 . 1	4	per	cent
Over	\$1	,000,000	and	to	\$1	,500),000) ,	 	 		 		 	 	 	 . 1	5	per	cent
Over	\$1	,500,000	and	to	\$2	,500),000) ,	 	 		 • •		 n	 		 . 1	6	per	cent
		2,500,000							 	 	•	 	0 6	 ٠.	 		 . 1	7	per	cent
(1939)), c	. 158, s.	5.)																	
- C11-				476 0 4																

Cited in Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

- § 105-7. Estate tax.—(a) A tax in addition to the inheritance tax imposed by this schedule is hereby imposed upon the transfer of the net estate of every decedent dying after March 24, 1939, whether a resident or nonresident of the State, where the inheritance tax imposed by this schedule is in the aggregate of a lesser amount than the maximum credit of eighty per cent (80%) of the federal estate tax allowed by the Federal Estate Tax Act as contained in the Federal Revenue Act of one thousand nine hundred and twenty-six, or subsequent acts and amendments, because of said tax herein imposed, then the inheritance tax provided for by this schedule shall be increased by an estate tax on the net estate so that the aggregate amount of tax due this State shall be the maximum amount of credit allowed under said Federal Estate Tax Act; said additional tax shall be paid out of the same funds as any other tax against the estate.
- (b) Where no tax is imposed by this schedule because of the exemptions herein or otherwise, and a tax is due the United States under the Federal Estate Tax Act, then a tax shall be due this State equal to the maximum amount of the credit

allowed under said Federal Estate Tax Act.

(c) The administrative provisions of this schedule, wherever applicable, shall apply to the collection of the tax imposed by this section. The amount of the tax as imposed by subsection (a) of this section shall be computed in full accordance with the Federal Estate Tax Act as contained in the Federal Revenue Act of one thousand nine hundred and twenty-six, or subsequent acts and amendments. (1939, c. 158, s. 6.)

Editor's Note.—See 13 N. C. Law Rev. 271, for article on "The Federal Estate Credit Clause."

§ 105-8. Credit allowed for gift tax paid.—In case a tax has been imposed under Schedule G of the Revenue Act of one thousand nine hundred and thirty-seven, or under subsequent acts, upon any gift, and thereafter upon the death of the donor, the amount thereof is required by any provision of this article to be included in the gross estate of the decedent, then there shall be credited against and applied in reduction of the tax, which would otherwise be chargeable against the beneficiaries of the estate under the provisions of this article, an amount equal to the tax paid with respect to such gift. Any additional tax found to be due because of the inclusion of gifts in the gross estate of the decedent, as provided herein, shall be a tax against the estate and shall be paid out of the same funds as any other tax against the estate. (1939, c. 158, s. 6½.)

Editor's Note.—For comment on this section, see 17 N. C. Law Rev. 381.

- § 105-9. **Deductions.**—In determining the clear market value of property taxed under this article, or schedule, the following deductions, and no others, shall be allowed:
- (a) Taxes accrued and unpaid at the death of the decedent and unpaid ad valorem taxes accruing during the calendar year of death.

(b) Drainage and street assessments (fiscal year in which death occurred).

(c) Reasonable funeral and burial expenses.

(d) Debts of decedent.

(e) Estate and inheritance taxes paid to other states, and death duties paid for-

eign countries, and the net amount of federal estate taxes as finally assessed under the Revenue Act of one thousand nine hundred and twenty-six. No deduction will be allowed for federal estate taxes levied by subsequent acts and amendments.

(f) Amount actually expended for monuments not exceeding the sum of five

hundred dollars (\$500.00).

(g) Commissions of executors and administrators actually allowed and paid.
(h) Costs of administration, including reasonable attorneys' fees. (1939, c.

158, s. 7; 1941, c. 50, s. 2.)

Editor's Note.—Prior to the 1941 amendment, subsection (a) read: "Taxes that have become due and payable and the prorata part of taxes accrued for the fiscal year that have not become due and payable."

No Corresponding Deduction Where Amount of Federal Tax Increased.—It is proper for a state statute levying inheritance and transfer taxes to refer to a federal statute in allowing deductions for amounts paid the federal government in estate taxes and in excepting from deductible amounts additional taxes levied by the federal government under a federal act effective on a certain date, and a tax-

payer relying on the State statute for the right to make deductions may not complain that additional federal taxes not deductible, were computed according to an amendment of the federal act changing the schedule of rates but depending upon the original act for the tax-levying provisions, although the amendment was enacted subsequent to the enactment of the State Revenue Act, since in such case the additional federal estate taxes are levied by the original federal act, although the amount thereof is computed under the amendment changing the schedule of rates. Harwood v. Maxwell, 213 N. C. 55, 195 S. E. 54 (1938).

§ 105-10. Where no personal representative appointed, clerk of superior court to certify same to Commissioner of Revenue. — Whenever an estate subject to the tax under this article shall be settled or divided among the heirs-at-law, legatees or devisees, without the qualification and appointment of a personal representative, the clerk of the superior court of the county wherein the estate is situated shall certify the same to the Commissioner of Revenue, whereupon the Commissioner of Revenue shall proceed to appraise said estate and collect the inheritance tax thereon as prescribed by this article. (1939, c. 158, s. 8.)

§ 105-11. Tax to be paid on shares of stock before transferred, and penalty for violation .- (a) Property taxable within the meaning of this article shall include bonds or shares of stock in any incorporated company incorporated in this State, regardless of whether or not such incorporated company shall have any or all of its capital stock invested in property outside of this State and doing business outside of this State, and the tax on the transfer of any bonds and/or shares of stock in any such incorporated company owning property and doing business outside of the State shall be paid before waivers are issued for the transfer of such shares of stock. No corporation of this State shall transfer any bonds or stock of said corporation standing in the name of or belonging to a decedent or in the joint names of a decedent and one or more persons, or in trust for a decedent, unless notice of the time of such transfer is served upon the Commissioner of Revenue at least ten days prior to such transfer, nor until said Commissioner of Revenue shall consent thereto in writing. Any corporation making such a transfer without first obtaining consent of the Commissioner of Revenue as aforesaid shall be liable for the amount of any tax which may thereafter be assessed on account of the transfer of such bonds and/or stock, together with the interest thereon, and in addition thereto a penalty of one thousand dollars (\$1,-000.00), which liability for such tax, interest, and penalty, may be enforced by an action brought by the State in the name of the Commissioner of Revenue. The word "transfer" as used in this article shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by distribution, or by statute, descent, devise, bequest, grant, deed, bargain, sale, gift, or otherwise. A waiver signed by the Commissioner of Revenue of North

Carolina shall be full protection for any such company in the transfer of any such stock.

- (b) Any incorporated company not incorporated in this State and owning property in this State which shall transfer on its books the shares of stock of any resident decedent holder of bonds and/or shares of stock in such company exceeding in value two hundred dollars (\$200.00) before the inheritance tax, if any, has been paid, shall become liable for the payment of said tax; and any property held by such company in this State shall be subject to execution to satisfy same. A receipt or waiver signed by the Commissioner of Revenue of North Carolina shall be full protection for any such company in the transfer of any such stock. (1939, c. 158, s. 9.)
- § 105-12. Commissioner of Revenue to furnish blanks and require reports of value of shares of stock.—(a) The Commissioner of Revenue shall prepare and furnish, upon application, blank forms covering such information as may be necessary to determine the amount of inheritance tax due the State of North Carolina on the transfer of any such bonds and/or stock; he shall determine the value of such bonds and/or stock, and shall have full authority to do all things necessary to make full and final settlement of all such inheritance taxes due or to become due.
- (b) The Commissioner of Revenue shall have authority, under penalties provided in this article, to require that any reports necessary to a proper enforcement of this article be made by any such incorporated company owning property in this State. (1939, c. 158, s. 10.)
- § 105-13. Life insurance proceeds.—The proceeds of life insurance policies, payable at or after the death of the decedent, shall, in the following instances, be taxable at the rates provided in this article, subject to the exemptions in § 105-3:
- 1. When such insurance proceeds are receivable by the executor as insurance under policies upon the life of the decedent, regardless of whether the premiums thereon were paid by the decedent.

2. When such insurance proceeds are receivable by all other beneficiaries as in-

surance under policies upon the life of the decedent—

(a) Where such insurance was purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance. In all such cases, it is declared that life insurance and the transfer of the proceeds thereof is testamentary in nature, and therefore, the payment of the premiums or other consideration by the decedent shall be deemed to effect a transfer from him at his death of benefits equal to such insurance proceeds, or such ratable proportion thereof regardless of (1) whether the decedent had taken or retained any incidents of ownership in said policies or (2) whether the decedent applied for said insurance or (3) whether the decedent was under a legal duty to pay said premiums or (4) whether said policies had been assigned irrevocably or otherwise, except as hereinafter stated. For the purpose of determining the amount of premiums or other consideration paid by decedent, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer;

(b) Or where, with respect to such insurance, the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. The term "incident of ownership," as used herein,

does not include a reversionary interest.

The decedent shall not be deemed to have paid premiums or other considera-

tion, within the meaning of this section, where the decedent has made a gift, either before or after the issuance of the policy, of money or property and the gift tax, if any, has been paid with respect to such gift, and the said money or prop-

erty has been used by the donee to pay any premium or premiums.

This section shall not apply to the proceeds of insurance policies transferred, by assignment or otherwise, during the life of the decedent if the transfer did not constitute a gift, in whole or in part, under article 6, Schedule G, of this chapter, or in case the transfer was made at a time when said article was not in effect, if the transfer would not have constituted a gift, in whole or in part, under said article had it been in effect at such time.

If a gift tax has been paid with respect to any gift of an insurance policy by the decedent, the amount of tax so paid shall be credited against the amount of inheritance tax due on the proceeds of such policy under this article, and if there was more than one beneficiary to such insurance, such credit shall be apportioned against the inheritance tax payable by each beneficiary in the ratio that the interest receivable by each beneficiary bears to the total amount of the insurance proceeds. (1939, c. 158, s. 11; 1943, c. 400, s. 1; 1945, c. 708, s. 1; 1947, c. 501, s. 1.)

Editor's Note.—The 1943 amendment rewrote this section. The 1945 amendment struck out the word "or" formerly appearing between "effect," and "if" in the third paragraph under subdivision (b) of subsection 2. And the 1947 amendment struck out the former proviso to the first paragraph of said subdivision.

For comment on 1943 amendment, see 21

N. C. Law Rev. 366.

Proceeds of Policy Procured by Beneficiary under Former Statute. — Section 11, c. 127, Public Laws 1937, could not be construed to impose a separate and independent excise tax upon the receipt of the proceeds of life insurance policies when such policies were issued to the beneficiary, who retained all rights and liabilities thereunder, in addition to imposing an inheritance tax on the proceeds of policies when they were issued to the insured or insured retained the right

to change the beneficiary or some other incidents of ownership, since that section had to be construed as a part of the whole act, and when so construed, no such intent appeared from its language. Wachovia Bank, etc., Co. v. Maxwell, 221 N. C. 528, 20 S. E. (2d) 840 (1942).

Where the wife procured a policy of insurance upon the life of her husband, the policy being issued on her application and all rights and liabilities thereunder being retained by her, upon the husband's death the proceeds of the policy were not subject to a tax under the provisions of § 11, c. 127, Public Laws 1937, as a gift inter vivos to take effect at or after death, even though the husband during his life voluntarily paid all premiums, since he did not procure the issuance of the policy and each payment of premium constituted a completed gift. Wachovia Bank, etc., Co. v. Maxwell, 221 N. C. 528, 20 S. E. (2d) 840 (1942).

§ 105-14. Recurring taxes.—Where property transferred has been taxed under the provisions of this article, such property shall not be assessed and/or taxed on account of any other transfer of like kind occurring within two years from the date of the death of the former decedent: Provided, that this section shall apply only to the transferees designated in §§ 105-4 and 105-5. (1939, c. 158, s. 12.)

Cross References.—See note to § 105-4. As to definition of "transfer," see § 105-11.

Whole Revenue Act Construed in Pari Materia.—The whole Revenue Act, of which this section and its inclusive references are a part, has a connotation of application to the current transfer upon which the tax is imposed—and all of its parts are to be considered in pari materia. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

Exemption Is Limited to Circumstances Attending Immediate Transfer. — When there have been successive transfers of the

property during the two-year period, the law intends to limit and define the exemption to the circumstances attending the immediate transfer sought to be taxed, and to limit the transferee claiming the exemption to the relationship existing between such transferee and the decedent from whom the estate is received—such transferee must be a Class A or Class B beneficiary of such decedent. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

Second Tax Required to Be Paid.— Where inheritance taxes, under the Revenue Act of 1939, are paid on property passing from a wife's estate to her husband, who dies within less than two years thereafter leaving the same property to a sister of his deceased wife, a second

inheritance tax must be paid thereon. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

- § 105-15. When all heirs, legatees, etc., are discharged from liability.—All heirs, legatees, devisees, administrators, executors, and trustees shall only be discharged from liability for the amount of such taxes, settlement of which they may be charged with, by paying the same for the use aforesaid as hereinafter provided. (1939, c. 158, s. 13.)
- § 105-16. Interest and penalty.—All taxes imposed by this article shall be due and payable at the death of the testator, intestate, grantor, donor, or vendor; if not paid within twelve months from date of death of the testator, intestate, grantor, donor, or vendor, such tax shall bear interest at the rate of six per centum (6%) per annum, to be computed from the expiration of twelve months from the date of the death of such testator, intestate, grantor, donor, or vendor until paid: Provided, that if the taxes herein levied shall not be paid in full within two years from date of death of testator, intestate, grantor, donor, or vendor, then and in such case a penalty of five per centum (5%) upon the amount of taxes remaining due and unpaid shall be added: Provided further, that the penalty of five per centum (5%) herein imposed may be remitted by the Commissioner of Revenue in case of unavoidable delay in settlement of estate or of pending litigation, and the Commissioner of Revenue is further authorized, in case of protracted litigation or other delay in settlement not attributable to laches of the party liable for the tax, to remit all or any portion of the interest charges accruing under this schedule, with respect to so much of the estate as was involved in such litigation or other unavoidable cause of delay: Provided, that time for payment and collection of such tax may be extended by the Commissioner of Revenue for good reasons shown. (1939, c. 158, s. 14; 1947, c. 501, s. 1.)

Editor's Note.—The 1947 amendment discount for payment within six months struck out the former provision relating to from date of death of testator, etc.

- § 105-17. Collection to be made by sheriff if not paid in two years.—If taxes imposed by this article are not paid within two years after the death of the decedent, it shall be the duty of the Commissioner of Revenue to certify to the sheriff of the county in which the estate is located the amount of tax due upon such inheritance, and the sheriff shall collect the same as other taxes, with an addition of two and one-half per cent $(2\frac{1}{2}\%)$ as sheriff's fees for collecting same, which fees shall be in addition to any salary or other compensation allowed by law to the sheriffs for their services; and the sheriff is hereby given the same rights of levy and sale upon any property upon which the said tax is payable as said officer is given for the collection of any and all other taxes. The sheriff shall make return to the Commissioner of Revenue of all such taxes within thirty days after collection. (1939, c. 158, s. 15.)
- § 105-18. Executor, etc., shall deduct tax.—The executor or administrator or other trustee paying any legacy or share in the distribution of any estate subject to said tax shall deduct therefrom at the rate prescribed, or if the legacy or share in the estate be not money, he shall demand payment of a sum to be computed at the same rates upon the appraised value thereof for the use of the State; and no executor or administrator shall pay or deliver any specific legacy or article to be distributed, subject to tax, except on the payment into his hands of a sum computed on its value as aforesaid; and in case of neglect or refusal on the part of said legatee to pay the same, such specific legacy or article, or so much thereof as shall be necessary, shall be sold by such executor or administrator at public sale, after notice to such legatee, and the balance that may be left in the hands of the executor or administrator shall be distributed as is or may be directed by law; and every sum of money retained by any executor or administrator or

paid into his hands on account of any legacy or distributive share for the use of the State shall be paid by him to the proper officer without delay. (1939, c. 158, s. 16.)

- § 105-19. Legacy for life, etc., tax to be retained, etc., upon the whole amount.—If the legacy or devise subject to said tax be given to a beneficiary for life or for a term of years, or upon condition or contingency, with remainder to take effect upon the termination of the life estate or the happening of the condition or contingency, the tax on the whole amount shall be due and payable as in other cases, and said tax shall be apportioned between such life tenant and the remainderman, such apportionment to be made by computation based upon the mortuary and annuity tables set out as §§ 8-46 and 8-47, and upon the basis of six per centum (6%) of the gross value of the estate for the period of expectancy of the life tenant in determining the value of the respective interests. When property is transferred or limited in trust or otherwise, and the rights, interest, or estate of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate, within the discretion of the Revenue Commissioner, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this article, and such tax so imposed shall be due and pavable forthwith out of the property transferred, and the Commissioner of Revenue shall assess the tax on such property. (1939, c. 158, s. 17.)
- § 105-20. Legacy charged upon real estate, heir or devisee to deduct and pay to executor, etc.—Whenever such legacy shall be charged upon or payable out of real estate, the heir or devisee of such real estate, before paying the same to such legatee, shall deduct the tax therefrom at the rates aforesaid, and pay the amount so deducted to the executor or administrator or the Commissioner of Revenue, and the same shall remain a charge upon such real estate until paid, and in default thereof the same shall be enforced by the decrees of the court in the same manner as the payment of such legacy may be enforced: Provided, that all taxes imposed by this article shall be a lien upon the real and personal property of the estate on which the tax is imposed or upon the proceeds arising from the sale of such property from the time said tax is due and payable, and shall continue a lien until said tax is paid and receipted for by the proper officer of the State: Provided further, that no lien for inheritance or estate taxes which accrued prior to May first, one thousand nine hundred and twenty-eight shall attach or affect the land. (1939, c. 158, s. 18.)
- § 105-21. Computation of tax on resident and nonresident decedents .- A tax shall be assessed on the transfer of property, including property specifically devised or bequeathed, made subject to tax as aforesaid in this State of a resident or nonresident decedent, if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this article, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this article if such decedent had been a resident of this State, and all his property, real and personal, had been located within this State, as such taxable property within this State bears to the entire estate, wherever situated. It shall be the duty of the personal representative to furnish to the Commissioner of Revenue such information as may be necessary or required to enable the Commissioner to ascertain a proper computation of his tax. Where the personal representative fails or refuses to furnish information from which this assessment can be made, the property in this State liable to tax under this article shall be taxed at the highest rate applicable to those who are strangers in blood. (1939, c. 158, s. 19.)

8 105-22. Duties of the clerks of the superior court.—(a) It shall be the duty of the clerk of the superior court to obtain from any executor or administrator, at the time of the qualification of such executor or administrator, the address of the personal representative qualifying, the names and addresses of the heirs-at-law, legatees, distributees, devisees, etc., as far as practical; the approximate value and character of the property or estate, both real and personal; the relationship of the heirs-at-law, legatees, devisees, etc., to the decedents, and forward the same to the Commissioner of Revenue on or before the tenth day of each month; and the Commissioner of Revenue shall furnish the several clerks blanks upon which to make said report, but the failure to so furnish blanks shall not relieve the clerk from the duty herein imposed. The clerk shall make no report of a death where the estate of a decedent is less than two thousand dollars (\$2,000.00) in value, when the beneficiary is husband or wife or child or grandchild of the decedent. Any clerk of the superior court who shall fail, neglect, or refuse to file such monthly reports as required by this section shall be liable to a penalty in the sum of one hundred dollars (\$100.00) to be recovered by the Commissioner of Revenue in an action to be brought by the Commissioner of Revenue.

(b) It shall also be the duty of the clerk of the superior court of each of the several counties of the State to enter in a book, prepared and furnished by the Commissioner of Revenue, to be kept for that purpose, and which shall be a public record, a condensed copy of the settlement of inheritance taxes of each estate, together with a copy of the receipt showing payment, or a certificate showing no tax due, as shall be certified to him by the Commissioner of Revenue.

(c) For these services, where performed by the clerk, the clerk shall be paid by the Commissioner of Revenue, when certificates and receipts are sent in to be recorded, as follows: For recording the certificate of the Commissioner of Revenue showing no tax due, the sum of fifty cents (50c). For recording the certificate of the Commissioner of Revenue showing that the tax received by the State is one hundred dollars (\$100.00) or less, he shall be paid the sum of one dollar (\$1.00). For recording the certificate of the Commissioner of Revenue showing that the tax received by the State is more than one hundred dollars (\$100.00) and not over five hundred dollars (\$500.00) he shall be paid the sum of two dollars (\$2.00). For recording the certificate of the Commissioner of Revenue showing that the tax received by the State is more than five hundred dollars (\$500.00) he shall be paid the sum of five dollars (\$5.00). which sum shall be the maximum amount paid for recording the certificate of the Commissioner of Revenue for any one estate: Provided, that where the decedent owns real estate in one or more counties, other than the county in which the administration of the estate is had, then the fee of the clerks of the courts of such other counties for recording the certificates of the Commissioner of Revenue shall be fifty cents (50c) each, and the same fee shall be paid for like service by the clerks in case of the settlement of the estates of nonresidents. The clerk of the superior court shall receive the sum of one dollar (\$1.00) for making up and transmitting to the Commissioner of Revenue the report required in this section, containing a list of persons who died leaving property in his county during the preceding month, etc.: Provided further, that where the clerk of the superior court has failed or neglected to make the report required of him in this section, in that case he shall only receive for recording the certificate of the Commissioner of Revenue the sum of fifty cents (50c).

The clerks of the superior courts of the several counties shall be allowed the fees provided for in this section in addition to other fees or salaries received by them, and any and all provisions in local acts in conflict with this section are

hereby repealed. (1939, c. 158, s. 20; 1943, c. 400, s. 1.)

Editor's Note.—The 1943 amendment infirst paragraph of subsection (c), from fifty creased the fee, in the last sentence of the cents to one dollar.

§ 105-23. Information by administrator and executor.—Every administrator shall prepare a statement in duplicate, showing as far as can be ascertained the names of all the heirs-at-law and their relationship to decedent, and every executor shall prepare a like statement, accompanied by a copy of the will, showing the relationship to the decedent of all legatees, distributees, and devisees named in the will, and the age at the time of the death of the decedent of all legatees, distributees, devisees to whom property is bequeathed or devised for life or for a term of years, and the names of those, if any, who have died before the decedent, together with the postoffice address of executor, administrator, or trustee. If any of the heirs-at-law, distributees, and devisees are minor children of the decedent, such statement shall also show the age of each of such minor children. The statement shall also contain a complete inventory of all the real property of the decedent located in and outside the State, and of all personal property, wherever situate, of the estate, of all insurance policies upon the life of the decedent, together with an appraisal under oath of the value of each class of property embraced in the inventory, and the value of the whole, together with any deductions permitted by this statute, so far as they may be ascertained at the time of filing such statement; and also the full statement of all gifts or advancements made by deed, grant, or sale to any person or corporation, in trust or otherwise, within three years prior to the death of the decedent. The statement herein provided for shall be filed with the Commissioner of Revenue at Raleigh, North Carolina, within twelve months after the qualification of the executor or administrator, upon blank forms to be prepared by the Commissioner of Revenue. If any administrator or executor fails or refuses to comply with any of the requirements of this section, he shall be liable to a penalty in the sum of five hundred dollars (\$500.00), to be recovered by the Commissioner of Revenue in an action to be brought by the Commissioner of Revenue to collect such sum in the superior court of Wake County against such administrator or executor. The Commissioner of Revenue, for good cause shown, may remit all or any portion of the penalty imposed under the provisions of this section. Every executor or administrator may make a tentative settlement of the inheritance tax with the Commissioner of Revenue, based on the sworn inventory provided in this section: Provided, that this does not apply to estates of less than two thousand dollars (\$2,000.00) in value when the beneficiaries are husband or wife or children or grandchildren, or parent or parents of the decedent. If any executor, administrator, collector, committee, trustee or any other fiduciary within or without this State holding or having control of any funds, property, trust or estate, the transfer of which becomes taxable under the provisions of this article, shall fail to file the statements herein required, within the times herein required, the Commissioner of Revenue is authorized and shall be required to secure the information herein required from the best sources available, and therefrom assess the taxes levied hereunder, together with the penalties herein and otherwise provided. (1939, c. 158, s. 21; 1947, c. 501, s. 1.)

Editor's Note. — The 1947 amendment substituted "twelve" for "six" in the fourth sentence.

§ 105-24. Access to safe deposits of a decedent; withdrawal of bank deposit, etc., payable to either husband or wife or the survivor.

No safe deposit company, trust company, corporation, bank, or other institution, person or persons having in possession or control or custody, in whole or in part, securities, deposits, assets, or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, shall deliver or transfer the same to any person whatsoever, whether in a representative capacity or not, or to the survivor or to the survivors when held in the joint names of a decedent and one or more per-

sons, without retaining a sufficient portion or amount thereof to pay taxes or interest which would thereafter be assessed thereon under this article; but the Commissioner of Revenue may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons from the obligation herein imposed. Provided: The clerk of superior court of the resident county of a decedent may authorize in writing any bank, safe deposit company, trust company, or any other institution to transfer to the properly qualified representative of the estate any funds on deposit in the name of the decedent or the decedent and one or more persons when the total amount of such deposit or deposits is three hundred dollars (\$300.00) or less, and when such deposit or deposits compose the total cash assets of the estate. Such authorization shall have the same force and effect as when issued in writing by the Commissioner of Revenue. Every safe deposit company, trust company, corporation, bank or other institution, person, or persons engaged in the business of renting lock boxes for the safekeeping of valuable papers and personal effects, or having in their possession or supervision in such lock boxes such valuable papers or personal effects shall, upon the death of any person using such lock box, as a condition precedent to the opening of such lock box by the executor, administrator, personal representative, or cotenant of such deceased person, require the presence of the clerk of the superior court of the county in which such lock box is located. It shall be the duty of the clerk of the superior court, or his representative, in the presence of an officer or representative of the safe deposit company, trust company, corporation, bank, or other institution, person or persons, to make an inventory of the contents of any such lock box and to furnish a copy of such inventory to the Commissioner of Revenue, to the executor, administrator, personal representative, or cotenant of the decedent, and a copy to the safe deposit company, trust company, corporation, bank, or other institution, person, or persons having possession of such lock box. The clerk of the superior court shall be paid for his services rendered as hereinbefore described by the representative of said estate at the time of his qualification the sum of two (\$2.00) dollars for the first hour or portion thereof actually required for said services, and the sum of one (\$1.00) dollar for each additional hour or portion thereof actually required for said services, subject to a maximum fee of five (\$5.00) dollars, and in addition thereto he shall receive the same mileage as is now allowed by law to witnesses for going from his office to any place located in his county to perform such services. The clerks of the superior court of the several counties shall be allowed the fees provided for in this section in addition to other fees or salaries received by them, and any and all provisions in local acts in conflict with this article are hereby repealed. Notwithstanding any of the provisions of this section any life insurance company may pay the proceeds of any policy upon the life of a decedent to the person entitled thereto as soon as it shall have mailed to the Commissioner of Revenue a notice, in such form as the Commissioner of Revenue may prescribe, setting forth the fact of such payment; but if such notice be not mailed, all of the provisions of this section shall apply.

Notwithstanding any of the provisions of this section, in any case where a bank deposit has been heretofore made or is hereafter made, or where building and loan stock has heretofore been issued or is hereafter issued, in the names of a husband and wife and payable to either or the survivor of them, such bank or building and loan association may, upon the death of either of such persons, upon mailing notice to the Commissioner of Revenue in such form as may be prescribed by the Commissioner stating the facts with respect to such deposits or stock, allow the survivor to withdraw as much as eighty per cent of such deposit or stock, and the balance thereof shall be retained by the bank or building and loan association to cover any taxes that may thereafter be assessed against such deposit or stock under this article. When such taxes as may be due on such

deposit or stock are paid, or when it is ascertained that there is no liability of such deposit or stock for taxes under this article, the Commissioner of Revenue shall furnish the bank or building and loan association his written consent for the payment of the retained percentage to the survivor; and the Commissioner of Revenue may furnish such written consent to the bank or building and loan association upon the qualification of a personal representative of the deceased. No bank or building and loan association shall be liable for any failure to withhold the specified percentage of such deposit or stock if the same was paid out prior to actual notice of the death of the deceased.

Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons liable for the amount of the taxes and interest due under this article on the succession to such securities, deposits, assets, or property, but in any action brought under this provision it shall be a sufficient defense that the delivery or transfer of securities, deposits, assets, or property was made in good faith without knowledge of the death of the decedent and without knowledge of circumstances sufficient to place the defendant on inquiry. (1939, c. 158, s. 21½; 1943, c. 400, s. 1.)

Editor's Note. — The 1943 amendment relating to clerk's fee, and inserted the changed the sentence of the first paragraph second paragraph.

§ 105-25. Supervision by Commissioner of Revenue. - The Commissioner of Revenue shall have complete supervision of the enforcement of all provisions of the Inheritance Tax Act and the collections of all inheritance taxes found to be due thereunder, and shall make all necessary rules and regulations for the just and equitable administration thereof. He shall regularly employ such deputies, attorneys, examiners, or special agents as may be necessary for the reasonable carrying out of its full intent and purpose. Such deputies, attorneys, examiners, or special agents shall, as often as required to do so, visit the several counties of the State to inquire and ascertain if all inheritance taxes due from estates of decedents, or heirs-at-law, legatees, devisees, or distributees thereof have been paid; to see that all statements required by this article are filed by administrators and executors, or by the beneficiaries under wills where no executor is appointed; to examine into all statements filed by such administrators and executors; to require such administrators and executors to furnish any additional information that may be deemed necessary to determine the amount of tax that should be paid by such estate. If not satisfied, after investigation, with valuation returned by the administrator or executor, the deputy, attorney, examiner, or appraiser shall make an additional appraisal after proper examination and inquiry, or may, in special cases, recommend the appointment by the Commissioner of Revenue of a special appraiser who, in such case, shall be paid five dollars (\$5.00) per day and expenses for his services. The administrator or executor, if not satisfied with such additional appraisal, may appeal within thirty days to the Commissioner of Revenue, which appeal shall be heard and determined as other cases. From this decision the administrator or executor shall have the right to appeal to the superior court of the county in which said estate is situated for the purpose of having said issue tried; said appeal to be made in the same way and manner as is now provided by law for appeals from the decisions of the Public Utilities Commission: Provided, that the tax shall first be paid, or satisfactory surety bond in double the amount of any alleged deficiency shall be filed with the Commissioner pending an appeal; and if it shall be determined upon trial that said tax or any part thereof was illegal or excessive, judgment shall be rendered therefor with interest, and the amount of tax so adjudged overpaid or declared invalid shall be certified by the clerk of court to the Commissioner of Revenue, who is authorized and directed to draw his account on the State Treasurer for the amount thereof. (1939, c. 158, s. 22.)

- § 105-26. Proportion of tax to be repaid upon certain conditions.— Whenever debts shall be proven against the estate of a decedent after the distribution of legacies from which the inheritance tax has been deducted in compliance with this article, and the legatee is required to refund any portion of the legacy, a proportion of the said tax shall be repaid to him by the executor or administrator if the said tax has not been paid into the State treasury, or shall be refunded by the State Treasurer, if it has been so paid in, upon certificate of the Commissioner of Revenue. (1939, c. 158, s. 23.)
- § 105-27. Commissioner of Revenue may order executor, etc., to file account, etc.—If the Commissioner of Revenue shall discover that reports and accounts have not been filed, and the tax, if any, has not been paid as provided in this article, he shall issue a citation to the executor, administrator, or trustee of the decedent whose estate is subject to tax, to appear at a time and place therein mentioned, not to exceed twenty days from the date thereof, and show cause why said report and account should not be filed and said tax paid; and when personal service cannot be had, notice shall be given as provided for service of summons by publication in the county in which said estate is located; and if said tax shall be found to be due, the said delinquent shall be adjudged to pay said tax, interest and cost; if said tax shall remain due and unpaid for a period of thirty days after notice thereof, the Commissioner of Revenue shall certify the same to the sheriff, who shall make collection of said tax, cost and commissions for collection, as provided in § 105-16. (1939, c. 158, s. 24.)
- § 105-28. Failure of administrator, executor, or trustee to pay tax.—Any administrator, executor, or trustee who shall fail to pay the lawful inheritance taxes due upon any estate in his hands or under his control within two years from the time of his qualification shall be liable for the amount of the said taxes, and the same may be recovered in an action against such administrator, executor, or trustee, and the sureties on his official bond. Any clerk of the court who shall allow any administrator, executor, or trustee to make a final settlement of his estate without having paid the inheritance tax due by law, and exhibiting his receipt from the Commissioner of Revenue therefor, shall be liable upon his official bond for the amount of such taxes. (1939, c. 158, s. 25.)
- 8 105-29. Uniform valuation.—(a) If the value of any estate taxed under this schedule shall have been assessed and fixed by the federal government for the purpose of determining the federal taxes due thereon prior to the time the report from the executor or administrator is made to the Commissioner of Revenue under the provisions of this article, the amount or value of such estate so fixed, assessed, and determined by the federal government shall be stated in such report. If the assessment of the estate by the federal government shall be made after the filing of the report by the executor or administrator with the Commissioner of Revenue, as provided in this article, the said executor or administrator shall, within thirty days after receipt of notice of the final determination by the federal government of the value or amount of said estate as assessed and determined for the purpose of fixing federal taxes thereon, make report of the amount so fixed and assessed by the federal government, under oath or affirmation, to the Commissioner of Revenue. If the amount of said estate as assessed and fixed by the federal government shall be in excess of that theretofore fixed or assessed under this schedule for the purpose of determining the amount of taxes due the State from said estate, then the Commissioner of Revenue shall reassess said estate and fix the value thereof at the amount fixed, assessed, and determined by the federal government, unless the said executor or administrator shall, within thirty days after notice to him from the Commissioner of Revenue, show cause why the valuation and assessment of said estate as theretofore made

should not be changed or increased. If the valuation placed upon said estate by the federal government shall be less than that theretofore fixed or assessed under this article, the executor or administrator may, within thirty days after filing his return of the amount so fixed or assessed by the federal government, file with the Commissioner of Revenue a petition to have the value of said estate reassessed and the same reduced to the amount as fixed or assessed by the federal government. In either event the Commissioner of Revenue shall proceed to determine, from such evidence as may be brought to his attention or which he shall otherwise acquire, the correct value of the said estate, and if the valuation is changed, he shall reassess the taxes due by said estate under this article and notify the executor or administrator of such fact. In the event the valuation on said estate shall be decreased, and if there shall have been an overpayment of the tax, the said Commissioner shall, within sixty days after the final determination of the value of said estate and the assessment of the correct amount of tax against the same, refund the amount of such excess tax theretofore paid.

- (b) If the executor or administrator shall fail to file with the Commissioner of Revenue the return under oath or affirmation, stating the amount or value at which the estate was assessed by the federal government as provided for in this section, the Commissioner of Revenue shall assess and collect from the executor or administrator a penalty equal to twenty-five per cent (25%) of the amount of any additional tax which may be found to be due by such estate upon reassessment and reappraisal thereof, which penalty shall under no condition be less than twenty-five dollars (\$25.00) or more than five hundred dollars (\$500.00) and which cannot be remitted by the Commissioner of Revenue except for good cause shown. The Commissioner of Revenue is authorized and directed to confer quarterly with the Department of Internal Revenue of the United States government to ascertain the value of estates in North Carolina which have been assessed for taxation by the federal government, and he shall co-operate with the said Department of Internal Revenue, furnishing to said Department such information concerning estates in North Carolina as said Department may request. (1939, c. 158, s. 26.)
- § 105-30. Executor defined.—Wherever the word "executor" appears in this article it shall include executors, administrators, collectors, committees, trustees, and all fiduciaries. (1939, c. 158, s. 27.)
- § 105-31. Additional remedies for enforcement of tax.—In addition to all other remedies which may now exist under the law, or may hereafter be established, for the collection of the taxes imposed by the preceding sections of this article, the tax so imposed shall be a lien upon all of the property and upon all of the estate, with respect to which the taxes are levied, as well as collectible out of any other property, resort to which may be had for their payment; and the said taxes shall constitute a debt, which may be recovered in an action brought by the Commissioner of Revenue in any court of competent jurisdiction in this State, and/or in any court having jurisdiction of actions of debt in any state of the United States, and/or in any court of the United States against an administrator, executor, trustee, or personal representative, and/or any person, corporation, or concern having in hand any property, funds, or assets of any nature, with respect to which such tax has been imposed. No title or interest to such estate, funds, assets, or property shall pass, and no disposition thereof shall be made by any person claiming an interest therein until the said taxes have been fully paid. (1939, c. 158, s. 28.)
- § 105-32. Reciprocal relations in respect to death taxes.—(a) The term "death tax" and "death taxes" as used in the five following subsections, shall include inheritance, succession, transfer and estate taxes and any taxes levied against the estate of a decedent upon the occasion of his death.

(b) At any time before the expiration of eighteen months after the qualification in any probate court in this Commonwealth of any executor of the will or administrator of the estate of any nonresident decedent, such executor or administrator shall file with such court proof that all death taxes, together with interest or penalties thereon, which are due to the state of domicile of such decedent, or to any political subdivision thereof, have been paid or secured, or that no such taxes, interest or penalties are due, as the case may be, unless it appears that letters testamentary or of administration have been issued on the estate of such decedent in the state of his domicile in the four following subsections called the domiciliary state.

(c) The proof required by subsection (b) may be in the form of a certificate issued by the official or body charged with the administration of the death tax laws of the domiciliary state. If such proof has not been filed within the time limited in subsection (b), and if within such time it does not appear that letters testamentary or of administration have been issued in the domiciliary state, the register of probate shall forthwith upon the expiration of such time notify by mail the official or body of the domiciliary state charged with the administration of the death tax laws thereof with respect to such estate, and shall state in such notice so far as is known to him (a) the name, date of death and last domicile of such decedent, (b) the name and address of each executor or administrator, (c) a summary of the values of the real estate, tangible personalty, and intangible personalty, wherever situated, belonging to such decedent at the time of his death, and (d) the fact that such executor or administrator has not filed theretofore the proof required in subsection (b). Such register shall attach to such notice a plain copy of the will and codicils of such decedent, if he died testate, or, if he died intestate, a list of his heirs and next of kin, so far as they are known to such register. Within sixty days after the mailing of such notice the official or body charged with the administration of the death tax laws of the domiciliary state may file with such probate court in this Commonwealth a petition for an accounting in such estate, and such official or body of the domiciliary state shall, for the purposes of this section, be a party interested for the purpose of petitioning such probate court for such accounting. If such petition be filed within said period of sixty days, such probate court shall decree such accounting, and upon such accounting being filed and approved shall decree either the payment of any such tax found to be due to the domiciliary state or subdivision thereof or the remission to a fiduciary appointed or to be appointed by the probate court, or other court charged with the administration of estates of decedents, of the domiciliary state, of the balance of the intangible personalty after the payment of creditors and expenses of administration in this Commonwealth.

(d) No final account of an executor or administrator of a nonresident decedent shall be allowed unless either (1) proof has been filed as required by subsection (b), or (2) notice under subsection (c) has been given to the official or body charged with the administration of the death tax laws of the domiciliary state, and such official or body has not petitioned for an accounting under said subsection within sixty days after the mailing of such notice, or (3) an accounting has been had under said subsection (c), a decree has been made upon such accounting and it appears that the executor or administrator has paid such sums and remitted such securities, if any, as he was required to pay or remit by such decree, or (4) it appears that letters testamentary or of administration have been issued by the domiciliary state and that no notice has been given under said subsection (c).

(e) Subsections (a) to (d), inclusive, shall apply to the estate of a non-resident decedent, only in case the laws of the domiciliary state contain a provision, of any nature or however expressed, whereby this Commonwealth is given reasonable assurance, as finally determined by the Commissioner, of the

collection of its death taxes, interest and penalties from the estates of decedents dying domiciled in this Commonwealth, when such estates are administered in whole or in part by a probate court, or other court charged with the administra-

tion of estates of decedents, in such other state.

(f) The provisions of subsections (a) to (e), inclusive, shall be liberally construed in order to insure that the domiciliary state of any nonresident decedent whose estate is administered in this Commonwealth shall receive any death taxes, together with interest and penalties thereon, due to it from the estate of such decedent. (1939, c. 158, s. 29.)

ARTICLE 2.

Schedule B. License Taxes.

§ 105-33. Taxes under this article.—Taxes in this article or schedule shall be imposed as State license taxes for the privilege of carrying on the business, exercising the privilege, or doing the act named, and nothing in this article shall be construed to relieve any person, firm, or corporation from the payment of the tax prescribed in this article or schedule: Provided, the obtaining of a license required by this article shall not of itself authorize the practice of a profession, business, or trade for which a State qualification license is required.

(a) If the business made taxable or the privilege to be exercised under this article or schedule is carried on at two or more separate places, a separate State li-

cense for each place or location of such business shall be required.

- (b) Every State license issued under this article or schedule shall be for twelve months, shall expire on the thirty-first day of May of each year, and shall be for the full amount of tax prescribed: Provided, that where the tax is levied on an annual basis and the licensee begins such business or exercises such privilege after the first day of January and prior to the thirty-first day of May of each year, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed and levied upon a gross receipts and/or percentage basis for the conducting of such business or the exercising of such privilege to and including the thirty-first day of May, next following. Every county, city and town license issued under this article or schedule shall be for twelve months, and shall expire on the thirty-first day of May or thirtieth day of June of each year as the governing body of such county, city or town may determine: Provided, that where the licensee begins such business or exercises such privilege after the expiration of seven months of the current license year of such municipality, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed upon a gross receipts and/or percentage basis.
- (c) The State license issued under §§ 105-41, 105-42, 105-43, 105-45, 105-48, 105-53, 105-54, 105-55, 105-56, 105-57, 105-58 and 105-59 shall be and constitute a personal privilege to conduct the profession or business named in the State license, shall not be transferable to any other person, firm or corporation and shall be construed to limit the person, firm or corporation named in the license to conducting the profession or business and exercising the privilege named in the State license to the county and/or city and location specified in the State license, unless otherwise provided in this article or schedule. Other license issued for a tax year for the conduct of a business at a specified location shall upon a sale or transfer of the business be deemed a sufficient license for the succeeding purchaser for the conduct of the business specified at such location for the balance of the tax year: Provided, that if the holder of a license under this schedule moves the business for which a license has been paid to another location, a new license may be issued to the licensee at a new location for the balance of the license year, upon surrender of the original license for cancellation and the payment of a fee of five dollars (\$5.00) for each license certificate reissued.

(d) Whenever, in any section of this article or schedule, the tax is graduated

with reference to the population of the city or town in which the business is to be conducted or the privilege exercised, the minimum tax provided in such section shall be applied to the same business or privilege when conducted or exercised outside of the municipality, unless such business is conducted or privilege exercised within one mile of the corporate limits of such municipality, in which event the same tax shall be imposed and collected as if the business conducted or the privilege exercised were inside of the corporate limits of such municipality: Provided, that with respect to taxes in this article, assessed on a population basis, the same rates shall apply to incorporated towns and unincorporated places or towns alike, with the best estimate of population available being used as a basis for determining the tax in unincorporated places or towns. The term "places or towns" means any unincorporated community, point or collection of people having a geographical name by which it may be generally known, and is so generally designated.

(e) All State taxes imposed by this article shall be paid to the Commissioner of Revenue, or to one of his deputies; shall be due and payable on or before the first day of June of each year, and after such date shall be deemed delinquent, and subject to all the remedies available and the penalties imposed for the payment of delinquent State license and privilege taxes: Provided, that if a person, firm, or corporation begins any business or the exercise of any privilege requiring a license under this article or schedule after the thirty-first day of May and prior to the thirty-first day of the following May of any year, then such person, firm, or corporation shall apply for and obtain a State license for conducting such business or exercising any such privilege in advance, and before the beginning of such business or the exercise of such privilege; and a failure to so apply and to obtain such State license shall be and constitute a delinquent payment of the State license tax due, and such person, firm, or corporation shall be subject to the remedies available and penalties imposed for the payment of such delinquent taxes.

(f) The taxes imposed and the rates specified in this article or schedule shall apply to the subjects taxed on and after the first day of June, one thousand nine hundred thirty-nine, and prior to said date the taxes imposed and the rates specified in the Revenue Act of one thousand nine hundred thirty-seven shall apply.

(g) It shall be the duty of a grantee, transferee, or purchaser of any business or property subject to the State license taxes imposed in this article to make diligent inquiry as to whether the State license tax has been paid, but when such business or property has been granted, sold, transferred, or conveyed to an innocent purchaser for value and without notice that the vendor owed or is liable for any of the State license taxes imposed under this article, such property, while in the possession of such innocent purchaser, shall not be subject to any lien for such State license taxes.

(h) All county or municipal taxes levied by the board of county commissioners of any county, or by the board of aldermen or other governing body of any municipality within this State, under the authority conferred in this article, shall be collected by the sheriff or tax collector of such county and by the tax collector of such city, and the county or municipal license shall be issued by such officer.

(i) Any person, firm, or corporation who shall willfully make any false statement in an application for a license under any section of this article or schedule shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, which fine shall not be less than the amount of tax specified under such section, and shall be in addition to the amount of such tax.

(j) Wherever the business taxed in §§ 105-61, 105-62, 105-79 and/or 105-84 is of a seasonal character at summer or winter resorts, license may be issued for such seasonal business at one-half of the annual license tax for the four months' period from June first to October first in summer resorts and from December first to April first in winter resorts. (1939, c. 158, s. 100; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment It substituted near the beginning of sub-added the proviso to the first paragraph.

ated sections for the words "thus obtained." The amendment also inserted in said subsection the provision relating to sale or transfer of business. For comment on amendment, see 21 N. C. Law Rev. 368.

Several Kinds of Business Conducted by Individual.—Where several occupations are conducted in a town by the same individual, a privilege tax on one does not prevent a similar tax on another. Guano Co. v. Tarboro, 126 N. C. 68, 35 S. E. 231 (1900).

Where Goods Manufactured in Another State.—The right of a state to tax traders, professions and avocations within the borders of the state is unquestionable, though the goods dealt in be manufactured in another state. State v. Gorham, 115 N. C. 721, 20 S. E. 179 (1894).

Cited in State v. Warren, 211 N. C. 75, 189 S. E. 108 (1937); Duke Power Co. v. Powles, 229 N. C. 143, 48 S. E. (2d) 287

(1948).

§ 105-34. Amusement parks.—Every person, firm, or corporation engaged in the business of operating a park, open to the public as a place of amusement, and in which there may be either a bowling alley, trained animal show, penny or nickel machine for exhibiting pictures, theatrical performance, or similar entertainment, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of conducting such amusement park, and shall pay for such license the following tax:

State license	for two months\$2	200.00
State license	for four months	100 00
State license	for eight months	500.00
State license	for twelve months	00.00

This section shall not apply to bathing beaches which are not operated for more than four months each year.

- (a) The licensee shall have the privilege of doing any or all of the things set out in this section; but the operation of a carnival, circus, or a show of any kind that moves from place to place shall not be allowed under the State license provided for in this section.
- (b) Counties shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 102.)
- § 105-35. Amusements traveling theatrical companies, etc. Every person, firm, or corporation engaged in the business of a traveling theatrical, traveling moving picture, and/or traveling vaudeville company, giving exhibitions or performances in any hall, tent, or other place not licensed under §§ 105-34 or 105-37, whether on account of municipal ownership or otherwise, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and pay for such license a tax of twenty-five dollars (\$25.00) for each day or part of a day's exhibits or performances: Provided, that
- (a) Artists exhibiting paintings or statuary work of their own hands shall only pay two dollars (\$2.00) for such State license.
- (b) Such places of amusement as do not charge more than a total of fifty cents (50c) for admission at the door, including a reserved seat, and shall perform or exhibit continuously in any given place as much as one week, shall be required to pay for such State license a tax of twenty-five dollars (\$25.00) per week.
- (c) The owner of the hall, tent, or other place where such amusements are exhibited or performances held shall be liable for the tax.
- (d) In lieu of the State license tax, hereinbefore provided for in this section, such amusement companies, consisting of not more than ten performers, may apply for an annual State-wide license, and the same may be issued by the Commissioner of Revenue for the sum of three hundred dollars (\$300.00), paid in advance, prior to the first exhibition in the State, shall be valid in any county of this State, and shall be in full payment of all State license taxes imposed in this section.

- (e) Any traveling organization which exhibits animals or conducts side shows in connection with its exhibitions or performances shall not be taxed under this section, but shall be taxed as herein otherwise provided.
- (f) The owner, manager, or proprietor of any such amusements described in this section shall apply in advance to the Commissioner of Revenue for a State license for each county in which a performance is to be given.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The Commissioner of Revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority of supervision as may be necessary to effectuate the purposes of this subchapter.

- (g) Counties, cities and towns may levy a license tax not in excess of the license tax levied by the State.
- (h) Where the taxpayer elects to pay an annual State-wide license in the sum of three hundred dollars (\$300.00) in advance, as provided for in subsection (d) of this section, counties, cities and towns may each levy a license tax not in excess of ten dollars (\$10.00) per week, provided such places of amusement do not charge more than a total of fifty cents (50c) for admission at the door, as provided for in subsection (b) of this section. (1939, c. 158, s. 103.)
- § 105-36. Amusements—manufacturing, selling, leasing, or distributing moving picture films or checking attendance at moving picture shows.—Every person, firm, or corporation engaged in the business of manufacturing, selling, leasing, furnishing and/or distributing films to be used in this State in moving picture theatres or other places at which an admission fee is charged shall apply for and obtain from the Commissioner of Revenue a Statewide license for the privilege of engaging in such business in this State, and shall pay for such license a tax of six hundred and twenty-five dollars (\$625.00): Provided, that persons, firms, or corporations engaged exclusively in the business of selling, leasing, furnishing and/or distributing films for use in places where no admission fee is charged or in schools, public or private, and other institutions of learning in this State, shall pay a tax of twenty-five dollars (\$25.00).

Any person, firm, or corporation engaged under contract or for compensation in the business of checking the attendance of any moving picture or show for the purpose of ascertaining attendance or amount of admission receipts at any theatre or theatres shall apply for and obtain from the Commissioner of Revenue a Statewide license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax of two hundred and fifty dollars (\$250.00).

Counties, cities, and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 104; 1947, c. 981.)

Editor's Note.—The 1947 amendment rewrote the first paragraph.

§ 105-36.1. Amusements—outdoor theatres.—(a) Every person, firm or corporation engaged in the business of operating an outdoor or drive-in moving picture show or places where vaudeville exhibitions or performances are given for compensation shall apply for and obtain in advance from the Commissioner of Revenue a State license for the privilege of engaging in such business and shall pay a tax in accordance with the following schedule:

For drive-in or outdoor theatres located in or within 10 miles of the corporate limits of cities and towns of

	Car Capacity Up to 150	Car Capacity 150 to 300	Car Capacity 300 to 500	Car Capacity 500 or over
less than 3,000 pop.	1.00 per car	1.10 per car	1.20 per car	1.30 per car
3,000 to 5,000 pop.	1.10 per car	1.20 per car	1.30 per car	1.40 per car
5,000 to 10,000 pop.	1.20 per car	1.30 per car	1.40 per car	1.50 per car
10,000 to 20,000 pop.	1.30 per car	1.40 per car	1.50 per car	1.60 per ear
20,000 to 40,000 pop.	1.40 per car	1.50 per car	1.60 per car	1.75 per car
40,000 and over	1.50 per car	1.60 per car	1.75 per car	2.00 per car

In addition to the foregoing tax based upon population and car capacity, every operator of a business taxed under this section shall pay a tax of one dollar (\$1.00) for each seat or seating space provided for patrons outside of motor vehicles driven into the enclosure by patrons. For the purpose of this section, car capacity shall be determined by the number of outlets provided for individual speakers. In the case of drive-in or outdoor theatres not equipped with individual speakers or outlets therefor, but which are equipped with one or more central speakers, the car capacity shall be regarded and rated as two hundred (200).

In the case of drive-in or outdoor theatres located within ten miles of the corporate limits of more than one municipality, the tax herein levied shall be paid in accordance with the rate applicable to the largest of such municipalities.

For the purpose of this section, unincorporated communities shall be regarded as incorporated municipalities, with the corporate limits deemed to extend one mile in every direction from the intersection of the two principal streets in such unincorporated community; and if there is no such intersection, then from the recognized business center of such unincorporated community.

In the case of drive-in or outdoor theatres located more than ten miles from the corporate limits of any municipality, the tax shall be paid at the rate herein provided for such theatres located within ten miles of the corporate limits of a municipality having a population of 3,000 to 5,000.

In the case of drive-in or outdoor theatres operating less than six months each

year, the tax shall be one-half the tax herein levied.

(1949, c. 392, s. 1.)

(b) Cities and towns may levy a tax upon the businesses taxed in this section not in excess of the following amounts:

§ 105-37. Amusements—moving pictures or vaudeville shows—admission.—Every person, firm, or corporation engaged in the business of operating a moving picture show or place where vaudeville exhibitions or performances are given or operating a theatre or opera house where public exhibitions or performances are given for compensation shall apply for and obtain in advance from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such State license for each room, hall, or tent used the following tax:

	Seating Ca- pacity up to 600 Seats	Seating Capacity of 600 to 1200 Seats	Seating Ca- pacity over 1200 Seats
In cities or towns of less than 1,500 population		\$ 150.00	\$ 200.00
In cities or towns of 1,500 and less than 3,000 population	200.00	250.00	300.00
In cities or towns of 3,000 and less than 5,000 population	250.00	300.00	400.00
In cities or towns of 5,000 and less than 10,000 population	350.00	400.00	600.00
In cities or towns of 10,000 and less than 15,000 population	400.00	600.00	800.00
25,000 population	500.00	800.00	1,000.00
In cities or towns of 25,000 and less than 40,000 population	600.00	1,000.00	1,500.00
In cities or towns of 40,000 population and over	800.00	1,500.00	2,500.00

(a) For any moving picture show operated more than two miles from the business center of any city having a population of twenty-five thousand, or over (for the purpose of this provision, the term "business center" to be defined as the intersection of the two principal business streets of the city), the tax levied shall be one-third of the above, based upon the population of the city in which such theatre is located or adjacent to.

(b) For any moving picture show operated within the city limits or within one mile of the corporate limits of any city having a population of twenty-five thousand (25,000), or over, and known as neighborhood or suburban theatres, or for any theatre operated exclusively for colored people in a city having a population of two thousand five hundred (2,500), or over, the tax levied shall be one-third of the above tax, based upon the population of such city.

(c) For any moving picture show operated at bathing beaches or resort towns for less than six months each year, the tax levied shall be one-half the annual tax provided above, based upon the population of the city or town in which such sea-

sonal moving picture show shall be operated.

(d) For any motion picture show operating three days or less each week, the tax levied shall be one-half the annual tax provided above, based upon the popu-

lation of the city or town in which such theatre is located.

(e) Counties shall not levy any license tax on the business taxed under the foregoing portions of this section. On the business described in the first paragraph of this section, cities and towns may levy a license tax not in excess of the following:

In	cities o	r towns	0	f less than 1,500 population	\$ 12.50
In	cities o	r towns	of	1,500 and less than 3,000 population	31.25
In	cities o	r towns	of	3,000 and less than 5,000 population	62.50
In	cities o	r towns	of	5,000 and less than 10,000 population	87.50
In	cities o	r towns	of	10,000 and less than 15,000 population	137.50
In	cities o	r towns	of	15,000 and less than 25,000 population	187.50
In	cities o	r towns	of	25,000 population or over	212.50

On the business described in subsection (a) of this section, cities and towns may levy a license tax not in excess of one hundred dollars (\$100.00); and on a business described in subsections (b), (c) or (d) of this section, cities and towns may levy a license tax not in excess of one-half of the tax authorized by the sched-

ule set forth in this subsection. (1939, c. 158, s. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1949, c. 392, s. 1; c. 1201.)

Editor's Note.—The 1943 amendment rewrote this section which formerly ended with subsection (g). The 1945 amendment made changes in former subsection (f). The 1947 amendment rewrote subsection (e), which ends the section as it now stands, and also rewrote former subsections (f) and (g) as subsections (a) and (b) of new § 105-37.1. The 1949 amendments rewrote subsection (b) of this section.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 368

Educational Entertainment Hall Exempt.—A musical conservatory, owning a hall in which it gives musical entertainments for the special benefit of its pupils and teachers, charging for admission thereto, is not liable for the opera house tax herein provided. Markham v. Southern Conservatory of Music, 130 N. C. 276, 41 S. E. 531 (1902).

The federal census in use at the time is the basis of determining population for the purposes of this section. State v. Prevo, 178 N. C. 740, 101 S. E. 370 (1919).

§ 105-37.1. Amusements — forms of amusement not otherwise taxed.—(a) Every person, firm or corporation engaged in the business of giving, offering or managing any form of entertainment or amusement not otherwise taxed or specifically exempted in this article, for which an admission is charged, shall pay an annual license tax for each room, hall, tent or other place where such admission charges are made, graduated according to population, as follows:

In	cities or towns of less than 1,500 population	Φ10 00
In	cities or towns of 1,500 and less than 3,000 population	\$10.00
In	cities or towns of 3,000 and less than 3,000 population	15.00
In	cities or towns of 3,000 and less than 5,000 population	20.00
TIL	cities of towns of 5,000 and less than 10,000 population	25 00
TII	cities of towns of 10,000 and less than 15,000 population	20.00
ln	cities or towns of 15,000 and less than 25,000 population	40.00
In	cities or towns of 25,000 population or over	40.00
	or 25,000 population of over	50 (0)

In addition to the license tax levied in the above schedule, such person, firm, or corporation shall pay an additional tax upon the gross receipts of such business at the rate of tax levied in article V, schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. Reports shall be made to the Commissioner of Revenue, in such form as he may prescribe, within the first ten days of each month covering all such gross receipts for the previous month, and the additional tax herein levied shall be paid monthly at the time such reports are made. The annual license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the annual license tax shall be applied as a credit upon or advance payment of the gross receipts tax.

Every person, firm, or corporation giving, offering, or managing any dance or athletic contest of any kind, except high school and elementary school athletic contests, for which an admission fee in excess of fifty cents (50c) is charged, shall pay an annual license tax of five dollars (\$5.00) for each location where such charges are made, and, in addition, a tax upon the gross receipts derived from admission charges in excess of fifty cents (50c) at the rate of tax levied in article V, schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. The additional tax upon gross receipts shall be levied and collected in accordance with such regulations as may be made by the Commissioner of Revenue. No tax shall be levied on admission fees for high school and elementary school contests. The tax levied in this last portion of this section shall apply to all privately owned toll bridges, including all charges made for all vehicles, freight and passenger, and the minimum charge of fifty cents (50c) for admission shall not apply to bridge tolls.

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half the

base tax levied herein. (1939, c. 158, s. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2.)

Editor's Note.—Prior to the 1947 amend-covered by former subsections (f) and (g) ment the provisions of this section were of § 105-37.

§ 105-38. Amusements — circuses, menageries, wild west, dog and/or pony shows, etc.—Every person, firm, or corporation engaged in the business of exhibiting performances, such as a circus, menagerie, wild west show, dog and/or pony show, or any other show, exhibition or performance similar thereto, not taxed in other sections of this article, shall apply for and obtain a State license from the Commissioner of Revenue for the privilege of engaging in such business, and pay for such license the following tax for each day or part of a day:

(a) Such shows and/or exhibitions traveling on railroads and requiring trans-

portation of:

Not more than two cars	\$ 30.00
Three to five cars, inclusive	45.00
Six to ten cars, inclusive	
Eleven to twenty cars, inclusive	
Twenty-one to thirty cars, inclusive	
Thirty-one to fifty cars, inclusive	
Over fifty cars	300.00

(b) Such shows and/or exhibitions traveling by automobiles, trucks, or other vehicles, other than railroad cars, and requiring transportation by:

Not over two vehicles	\$ 7.50
Three to five vehicles	10.00
Six to ten vehicles	15.00
Eleven to twenty vehicles	
Twenty-one to thirty vehicles	45.00
Thirty-one to fifty vehicles	60.00
Fifty-one to seventy-five vehicles	75.00
Seventy-six to one hundred vehicles	100.00
Over one hundred vehicles, per vehicle in excess thereof	5.00

It is the intent of this subsection that every vehicle used in transporting circus property or personnel, whether owned by the circus or by others, shall be counted

in computing the tax.

(c) Every person, firm, or corporation by whom any show or exhibition taxed under this section is owned or controlled shall file with the Commissioner of Revenue, not less than five days before entering this State for the purpose of such exhibitions or performances therein, a statement, under oath, setting out in detail such information as may be required by the Commissioner of Revenue covering the places in the State where exhibitions or performances are to be given, the character of the exhibitions, the mode of travel, the number of cars or other conveyances used in transferring such shows, and such other and further information as may be required. Upon receipt of such statement, the Commissioner of Revenue shall fix and determine the amount of State license tax with which such person, firm, or corporation is chargeable, shall endorse his findings upon such statement, and shall transmit a copy of such statement and findings to each such person, firm, or corporation to be charged, to the sheriff or tax collector of each county in which exhibitions or performances are to be given, and to the division deputy of the Commissioner of Revenue, with full and particular instructions as to the State license tax to be paid. Before giving any of the exhibitions or performances provided for in such statement, the person, firm, or corporation making such statement shall pay the Commissioner of Revenue the tax so fixed and determined. If one or more of such exhibitions or performances included in such statement and

for which the tax has been paid shall be canceled, the Commissioner of Revenue may, upon proper application made to him, refund the tax for such canceled exhibitions or performances. Every such person, firm, or corporation shall give to the Commissioner of Revenue a notice of not less than five days before giving any of such exhibitions or performances in each county.

- (d) The sheriff of each county in which such exhibitions or performances are advertised to be exhibited shall promptly communicate such information to the Commissioner of Revenue; and if the statement required in this section has not been filed as provided herein, or not filed in time for certified copies thereof, with proper instructions, to be transmitted to the sheriffs of the several counties and the division deputy commissioner, the Commissioner of Revenue shall cause his division deputy to attend at one or more points in the State where such exhibitions or performances are advertised or expected to exhibit, for the purpose of securing such statement prescribed in this section, of fixing and determining the amount of State license tax with which such person, firm, or corporation is taxable, and to collect such tax or give instructions for the collection of such tax.
- (e) Every such person, firm, or corporation by whom or which any such exhibition or performance described in this section is given in any county, city or town, or within five miles thereof, wherein is held an annual agricultural fair, during the week of such annual agricultural fair, shall pay a State license of one thousand dollars (\$1,000.00) for each exhibition or performance in addition to the license tax first levied in this section, to be assessed and collected by the Commissioner of Revenue or his duly authorized deputy.
- (f) The provisions of this section, or any other section of this article, shall not be construed to allow without the payment of the tax imposed in this section, any exhibition or performance described in this section for charitable, benevolent, educational, or any other purpose whatsoever, by any person, firm, or corporation who is engaged in giving such exhibitions or performances, no matter what terms of contract may be entered into or under what auspices such exhibitions or performances are given. It being the intent and purpose of this section that every person, firm, or corporation who or which is engaged in the business of giving such exhibitions or performances, whether a part or all of the proceeds are for charitable, benevolent, educational, or other purposes or not, shall pay the State license tax imposed in this section.
- (g) Every such person, firm, or corporation who shall give any such exhibitions or performances mentioned in this section within this State, before the statement provided for has been filed with the Commissioner of Revenue, or before the State license tax has been paid, or which shall, after the filing of such statement, give any such exhibitions or performances taxable at a higher rate than the exhibition or performance authorized by the Commissioner of Revenue upon the statement filed, shall pay a State license tax of fifty per cent (50%) greater than the tax hereinbefore prescribed, to be assessed and collected either by the Commissioner of Revenue or by his division deputy.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The Commissioner of Revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority of supervision as may be necessary to effectuate the purposes of this subchapter.

(h) In lieu of the tax levied in § 105-86, each circus, or other form of amusement taxed under this section, advertising by means of outdoor advertising displays, a bill posting or as otherwise defined in § 105-86, shall pay a tax of one hun-

dred dollars (\$100.00) for a State-wide license for the privilege of advertising in this manner, said tax to be in addition to the other taxes levied in this section.

(i) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of one-half of the license tax levied by the State, but shall not levy a parade tax or a tax under subsection (h) of this section. (1939, c. 158, s. 106.)

§ 105-39. Amusements—carnival companies, etc. — Every person, firm, or corporation engaged in the business of a carnival company or a show of like kind, moving picture and vaudeville shows, museums and menageries, merry-gorounds, ferris wheels, riding devices, and other like amusements, and enterprises, conducted for profit, under the same general management, or an aggregate of shows, amusements, eating places, riding devices, or any of them operating together on the same lot or contiguous lots or streets, traveling from place to place, whether owned and actually operated by separate persons, firms, or corporations or not, filling week-stand engagements, or giving week-stand exhibitions, under canvas or not, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business or amusement, and shall pay for such license for each week, or part of a week, a tax based according to the population of the city or town in which such carnival is showing as follows:

Provided that any carnival operating within a radius of five miles of any city shall pay the same tax as if they were actually showing within the city limits of said town. Provided further that if such a carnival operates over five miles from any city or town such a carnival shall be liable for a tax of one hundred dollars (\$100.00) per week or part of a week.

Provided, that when a person, firm, or corporation exhibits only riding devices which are not a part of, nor used in connection with any carnival company, the tax shall be ten dollars (\$10.00) per week for each such riding device, provided that counties, cities and towns may levy and collect a license tax upon such rid-

ing devices not in excess of five dollars (\$5.00) for each such device.

Provided, further, that it shall be unlawful under this section for the owners and/or operators of riding devices to operate, or cause to be operated, any show,

game, stand or other attraction whatsoever.

- (a) This section shall not repeal any local act prohibiting any of the shows, exhibitions, or performances mentioned in this section, or limit the authority of the board of county commissioners of any county, or the board of aldermen or other governing body of any city or town, in prohibiting such shows, exhibitions, or performances. If the Commissioner of Revenue shall issue a State license for any such show, exhibition, or performance in any county or municipality having a local statute prohibiting the same, then the said State license shall not authorize such show, exhibition, or performance to be held in such county or municipality, but the Commissioner of Revenue shall refund, upon proper application, the tax paid for such State license.
- (b) No person, firm, or corporation, nor any aggregation of same, giving such shows, exhibitions, or performances, shall be relieved from the payment of the tax levied in this section, regardless of whether or not the State derives a benefit from same. Nor shall any carnival operating or giving performances or exhibitions, in connection with any fair in North Carolina, be relieved from the payment of tax levied in this section. It is the intent and purpose of this section that every person, firm, or corporation, or aggregation of same which is engaged in the giving of such shows, exhibitions, performances, or amusements, whether the whole or a part of the proceeds are for charitable, benevolent, educational, or other purposes whatsoever, shall pay the State license taxes provided for in this section.

It is not the purpose of this article to discourage agricultural fairs in the State. and to further this cause, no carnival company will be allowed to play a "still date" in any county where there is a regularly advertised agricultural fair, thirty days prior to the dates of said fair. An agricultural fair shall be construed as meaning

one that has operated at least one year prior to March 24, 1939.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon the gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The Commissioner of Revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority or supervision as may be necessary to effectuate the purposes of this subchapter.

Nothing herein contained shall prevent American Legion Posts in North Carolina from holding fairs or tobacco festivals on any dates which they may select, provided said fair and festivals have heretofore been held as annual events.

(c) Counties, cities and towns may levy a license tax on the business taxed hereunder not in excess of one-half of that levied by the State. (1939, c. 158, s. 107; 1941, c. 50, s. 3; 1947, c. 501, s. 2.)

Editor's Note.—The 1941 amendment rewrote a portion of this section preceding subsection (a), and the 1947 amendment substituted "thirty" for "fifteen" in the

second paragraph of subsection (b). For comment on the 1941 amendment, see 19 N. C. Law Rev. 529.

§ 105-40. Amusements - certain exhibitions, performances, and entertainments exempt from license tax. - All exhibitions, performances, and entertainments, except as in this article expressly mentioned as not exempt. produced by local talent exclusively, and for the benefit of religious, charitable, benevolent or educational purposes, and where no compensation is paid to such local talent shall be exempt from the State license tax. (1939, c. 158, s. 108.)

-A musical conservatory, owning a hall in the opera house tax provided in § 105-37. which it gives entertainments for the special benefit of its pupils and teachers,

Educational Entertainment Hall Exempt, charging admission thereto, is not liable for Markham v. Southern Conservatory of Music, 130 N. C. 276, 41 S. E. 531 (1902).

§ 105-41. Attorneys at law and other professionals.—Every practicing attorney at law, practicing physician, veterinary, surgeon, osteopath, chiropractor, chiropodist, dentist, oculist, optician, optometrist, any person practicing any professional art of healing for a fee or reward, civil engineer, electrical engineer, mining engineer, mechanical engineer, architect and landscape architect, photographer, canvasser for any photographer, agent of a photographer in transmitting pictures or photographs to be copied, enlarged or colored (including all persons enumerated in this section employed by the State, county, municipality, a corporation, firm or individual), and every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation. who is engaged in the business of selling or offering for sale, buying or offering to buy, negotiating the purchase, sale, or exchange of real estate, or who is engaged in the business of leasing or offering to lease, renting or offering to rent, or of collecting any rents as agent for another for compensation, or who is engaged in the business of soliciting and/or negotiating loans on real estate as agent for another for a commission, brokerage and/or other compensation, shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business or profession, or the doing of the act named, and shall pay for such license twenty-five dollars (\$25.00): Provided, that no professional man or woman shall be required to pay a privilege tax after he or she has arrived at the age of seventy-five years. Further provided, that it shall be unlaw-

ful for a nonresident of this State to engage in the real estate business in this State, as defined in this section, unless the State of residence of such person will permit a resident of this State to engage in such business. Any person who shail engage in the real estate business in this State in violation of the terms of this provision shall be guilty of a misdemeanor and shall be punished in the discretion of the court; and further provided, that the obtaining of a real estate dealer's license by such person shall not authorize such nonresident to engage in the real estate business in this State, and provided further that in all prosecutions under this section, a certificate under the hand and seal of the Commissioner of Revenue that the accused filed no income tax returns with his department for the preceding taxable year shall be prima facie evidence that the accused is a nonresident and that his license is void.

Every person engaged in the public practice of accounting as a principal, or as a manager of the business of public accountant, shall pay for such license twenty-five dollars (\$25.00), and in addition shall pay a license of twelve and fifty one-hundredths dollars (\$12.50) for each person employed who is engaged in the capacity of supervising or handling the work of auditing, devising or installing systems of accounts.

Every licensed mortician or embalmer shall in like manner apply for and obtain from the Commissioner of Revenue a State-wide license for practicing his profession, whether for himself or in the employ of another of ten dollars (\$10.00).

Licenses issued under this section are issued as personal privilege licenses and shall not be issued in the name of a firm or corporation: Provided, that a licensed photographer having a located place of business in this State, shall be liable for a license tax on each agent or solicitor, employed by him for soliciting business. If any person engages in more than one of the activities for which a privilege tax is levied by this section, such person shall be liable for a privilege tax with respect to each activity engaged in.

(a) Only one-half of the tax levied in this section shall be collected from those persons whose gross receipts from the business or profession for the preceding year did not exceed one thousand dollars (\$1,000.00).

(b) License revocable for failure to pay tax.

Whenever it shall be made to appear to any judge of the superior court that any person practicing any profession for which the payment of a license tax is required by this section has failed, or fails, to pay the professional tax levied in this section, and execution has been issued for the same by the Commissioner of Revenue and returned by the proper officer "no property to be found," or returned for other cause without payment of the tax, it shall be the duty of the judge presiding in the superior court of the county in which such person resides, upon presentation therefor, to cause the clerk of said court to issue a rule requiring such person to show cause by the next term of court why such person should not be deprived of license to practice such profession for failure to pay such professional tax. Such rule shall be served by the sheriff upon said person twenty days before the next term of the court, and if at the return term of court such person fails to show sufficient cause, the said judge may enter a judgment suspending the professional license of such person until all such tax as may be due shall have been paid, and such order of suspension shall be binding upon all courts, boards and commissions having authority of law in this State with respect to the granting or continuing of license to practice any such profession.

(c) Counties, cities, or towns shall not levy any license tax on the business or professions taxed under this section; and the State-wide license herein provided for shall privilege the licensee to engage in such business or profession in every county, city, or town in this State. (1939, c. 158, s. 109; 1941, c. 50, s. 3; 1943, c. 400, s. 2; 1949, c. 683.)

Editor's Note. - The 1941 amendment excepting photographers, etc. Prior to the struck out a provision of subsection (c) amendment each county and city had the privilege of levying a similar tax upon photographers. Lucas v. Charlotte, 14 F. Supp. 163 (1936).

The 1943 amendment added the last sen-

tence of the fourth paragraph.

The 1949 amendment added that part of the first paragraph beginning with the proviso preceding the last sentence.

For comment on the 1943 amendment,

see 21 N. C. Law Rev. 367.

Persons Making "Negatives" Are Photographers Subject to License Tax.—To solicit persons to have their photographs taken, arrange for the sitting, and actually have the camera present and take what is popularly called a picture, but in fact is a "negative," which is the outline of the subject on glass, is engaging within the State in the profession or business of photography within the meaning of this section. Lucas v. Charlotte, 14 F. Supp. 163 (1936).

Although the "negatives" are sent to another state for development the assessment of the tax under this section on photographers does not constitute an interference with or burden upon interstate commerce. Lucas v. Charlotte, 14 F. Supp. 163 (1936)

Discriminatory Statute Applying to Real Estate Brokers Is Unconstitutional.—Public-Local Laws of 1927, c. 241, requiring real estate brokers and salesmen in certain designated counties to be licensed by a real estate commission on the basis of moral character and proficiency in the public interest, and requiring the payment of a license fee in addition to the license required by this section, was held unconstitutional as discriminatory. State v. Warren, 211 N. C. 75, 189 S. E. 108 (1937).

Quoted in State v. Dixon, 215 N. C. 161,

1 S. E. (2d) 521 (1939).

§ 105-41.1. Bondsmen. — Every person, firm, or corporation, excepting agents of insurance or bonding companies which are licensed by the Commissioner of Insurance to issue bonds, engaged in the business of writing or executing, for a consideration, appearance, compliance, or bail bonds, or any type of bond or undertaking required in connection with criminal proceedings in any of the courts of this State, shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business and shall pay for such license the following tax:

In cities or towns of less than 2,000 population	\$10.00
In cities or towns of 2,000 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 population or over	40.00

If any person, firm, or corporation, required to be licensed under the provisions of this section, engages in said business in two or more cities or towns, such person, firm, or corporation shall procure a license based on the population of the largest city or town in which the business taxed under this section is carried on.

Counties, cities and towns may levy a license tax on the business taxed under

this section in an amount not in excess of the tax levied by the State.

Persons, firms or corporations licensed hereunder who or which do not engage in any of the kinds of insurance business described in § 58-72 shall be exempt from being licensed or regulated by the Commissioner of Insurance. (1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2.)

Editor's Note.—The 1945 amendment inserted the paragraph following the table of tax amounts. The 1947 amendment added the last paragraph.

In Certain Counties.—As to taxation and

regulation of professional bondsmen in Cumberland County, see Session Laws 1943, c. 316; in Wayne County, see Session Laws 1943, c. 210.

§ 105-42. Detectives. — Every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in business as a detective or what is ordinarily known as "secret service work," or who is engaged in the business of soliciting such business, shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business, and shall pay for such license a tax of twenty-five dollars (\$25.00): Provided, any such person regularly employed by the United States government, any state or political subdivision of any state shall not be required to pay the license herein provided for. (1939, c. 158, s. 110.)

§ 105-43. Real estate auction sales.—(a) Every person, firm, or corporation engaged in the business of conducting auction sales of real estate for profit or compensation shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business in this State, and shall pay for such license a tax of two hundred and fifty dollars (\$250.00).

Provided, that any person, firm, or corporation engaged in the business of conducting auction sales in one county only in this State, shall be liable for a license

tax in the amount of seventy-five dollars (\$75.00).

(b) This section shall not apply to sales for foreclosure of liens or sales made

by order of court.

- (c) Counties, cities, and towns may levy a tax on the business taxed under this section not in excess of twelve and fifty one-hundredths dollars (\$12.50) for each sale conducted in the county, city, or town: Provided, that the total tax levied by any county, city, or town on said business during any year shall not exceed twenty-five dollars (\$25.00). (1939, c. 158, s. 111.)
- § 105-44. Coal and coke dealers.—(a) Every person, firm, or corporation, either as agent or principal, engaged in and conducting the business of selling and/or delivering coal or coke in carload lots, or in greater quantities, shall be deemed a wholesale dealer, and shall apply for and procure from the Revenue Commissioner a State license and pay for such license the sum of seventy-five dollars (\$75.00): Provided, that if such wholesale dealer shall also sell and/or deliver coal or coke in less than carload lots, he shall not be subject to the retailer's license tax provided in this section.
- (b) Every person, firm, or corporation engaged in and conducting the business of selling and/or delivering coal or coke at retail shall apply for and procure from the Commissioner of Revenue a State license, and shall pay for such license for each city or town in which such coal or coke is sold or delivered, as follows:

In cities or towns of less than 2,500 population	\$10.00
In cities or towns of 2,500 and less than 5.000 population	1500
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 25,000 population	50.00
In cities or towns of 25,000 and over	75.00

Dealers or peddlers in coal who sell in quantities of not more than one hundred (100) pounds shall pay a State license tax of five dollars (\$5.00); provided that this section shall not apply to persons, firms or corporations who deliver coal or coke to State institutions or public schools only.

- (c) No county shall levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State.
- (d) From the taxes levied under authority of this section, any person, firm or corporation owning or operating a coal mine in this State shall be allowed to deduct the amount of ad valorem taxes for the current year levied by any county in this State on the mine, mineral rights or land itself, from which said coal is mined: Provided, further, that any person, firm or corporation soliciting orders for pool cars of coal to be distributed without profit shall be subject to the license tax. (1939, c. 158, s. 112; 1941, c. 50, s. 3.)

Editor's Note. — The 1941 amendment added the proviso at the end of subsection (b) and changed subsection (d).

Census Applicable for 1940.—In ascertaining the State license tax on businesses in accordance with the graduated scale based upon the population of the municipalities in which the business is operated,

for the tax year beginning July 1, 1940, the Commissioner of Revenue properly used the 1930 United States census figures, since the 1940 figures were not available at the beginning of that tax year. Clark v. Greenville, 221 N. C. 255, 20 S. E. (2d) 56 (1942).

Cited in Atlantic Ice, etc., Co. v. Maxwell, 210 N. C. 723, 188 S. E. 381 (1936).

§ 105-45. Collecting agencies.—Every person, firm, or corporation engaged in the business of collecting, for a profit, claims, accounts, bills, notes, or other money obligations for others, and of rendering an account for same, shall be deemed a collection agency, and shall apply for and receive from the Commissioner of Revenue a State license for the privilege of engaging in such business, and pay for such license a tax of fifty dollars (\$50.00).

(a) This section shall not apply to a regularly licensed practicing attorney at

- (b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 113.)
- § 105-46. Undertakers and retail dealers in coffins. Every person, firm, or corporation engaged in the business of burying the dead, or in the retail sale of coffins, shall apply for and procure from the Revenue Commissioner a State license for transacting such business within this State, and shall pay for such license the following tax:

In cities or towns of less than 500 population	\$ 10.00
In cities or towns of 500 and less than 5,000 population	25.00
In cities or towns of 5,000 and less than 10,000 population	40.00
In cities or towns of 10,000 and less than 15,000 population	50.00
In cities or towns of 15,000 and less than 25,000 population	75.00
In cities or towns of 25,000 population or over	100.00

This section shall not apply to a cabinetmaker (who is not an undertaker) who makes coffins to order.

No county shall levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 114.)

§ 105-47. Dealers in horses and/or mules. — Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall apply for and procure from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State and shall pay for such license an annual tax for each location where such business is carried on as follows:

Where not more than one carload of horses and/or mules is purchased	
for the purpose of resale	\$ 25.00
Where more than one carload and not more than two carloads of horses	
and/or mules are purchased for the purpose of resale	50.00
Where more than two carloads of horses and/or mules are purchased for	
the purpose of resale	100.00

For the purpose of calculating the amount of tax due under the above schedule, a carload of horses and/or mules shall be twenty-five (25) and purchases for the preceding license tax year shall be used as a medium for arriving at the amount of tax due for the ensuing year: Provided, however, that if during the current license year horses and/or mules are purchased for the purpose of resale in such quantities that would establish liability for a greater tax than that previously paid, it shall be immediately remitted to the Commissioner of Revenue with the license which has already been issued in order that it may be cancelled and a corrected license issued.

In addition to the above license, every person, firm, or corporation engaged in the business of purchasing for the purpose of resale and/or selling horses and/or mules at public auction, either on his or its own behalf or for any other person, whether a commission or fee is or is not charged, shall apply for and procure from the Commissioner of Revenue a State license for each place of auction and shall pay for such license an annual tax of one hundred dollars (\$100.00).

In addition to the above license, every transient vendor of horses and/or mules who has no permanent or established place of business in this State shall apply for and procure from the Commissioner of Revenue a State license for each county in which horses and/or mules are sold and shall pay for such license an annual

tax of three hundred dollars (\$300,00).

(a) In addition to the annual licenses levied in this section, every person, firm, or corporation, engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall pay a tax of three dollars (\$3.00) per head on all such horses and/or mules purchased for the purpose of resale. "Purchase" shall be taken to mean and shall include all horses and/or mules acquired or received as a result of outright purchase or on consignment, account or otherwise for resale, either at wholesale or retail: Provided, however, that "purchases" shall not include the acquisition of horses and/or mules which are acquired or received as a result of an allowance for credit for horses and/or mules taken in part payment on horses and/or mules subject to the tax imposed in this section nor shall it include horses and/or mules which have been repossessed as a result of nonpayment of the original sales or purchase price. "Purchases" shall include all horses and/or mules acquired for the purpose of resale, either at wholesale or retail, whether such horses and/or mules are shipped into this State by railroad or brought in otherwise.

The original or first dealer or consignee, purchasing or receiving horses and/or mules in this State, shall be primarily liable for payment of the additional perhead tax levied in this section. Horse and/or mule auctioneers, engaged in the business of purchasing, acquiring or receiving on consignment, account or otherwise, either as principal or agent, horses and/or mules from out-of-State dealers or other persons and selling same at either private or public auction, shall be primarily liable for payment of the additional per-head tax levied in this section unless sold to a licensed dealer for the purpose of resale. In order to avoid double taxation, dealers purchasing or acquiring horses and/or mules from another established dealer located within this State may be relieved of reporting the additional per-head tax on such horses and/or mules acquired from another dealer located within this State, provided an official receipt or statement from the Commissioner of Revenue or his duly authorized agents is produced, showing that the additional

per-head tax levied in this section has been paid.

(b) The additional per-head tax levied in this section on purchases of horses and/or mules purchased for the purpose of resale, either at wholesale or retail, shall be due and payable immediately upon receipt of such horses and/or mules within this State. The Commissioner of Revenue may, however, in his discretion, where he thinks circumstances justify it, permit licensed and established dealers to file monthly reports, which reports shall be due to be filed on or before the fifteenth (15th) of each month for all purchases during the preceding month, and such report when filed shall be accompanied by a remittance for the amount of tax shown to be due. Reports shall be filed in such form and in such manner as may be prescribed by the Commissioner of Revenue, and failure to file the report herein prescribed and pay the tax as shown to be due thereon shall subject such dealer to a penalty of five per cent (5%) of the amount of tax due for each month or fraction thereof that such report may be delinquent.

(c) Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall keep a full, true and accurate record of all purchases and sales, including purchase invoices and freight bills covering such purchases and sales of all horses and/or mules until such purchases and sales, including purchase invoices and freight bills, have been checked by a duly authorized agent of the Commissioner of Revenue. Failure to comply with the provisions of this section in this respect shall be prima facie evidence of attempting to evade the additional taxes levied in this section and shall subject such dealer, in addition to all other penalties imposed by this article, to the additional per-head tax on all purchases and/or sales from whatever

source such horses and/or mules are acquired or received, and it shall be the duty of the Commissioner of Revenue or his duly authorized agents to assess the additional tax upon an estimation of purchases and/or sales from the best information ohtainable

(d) As a condition to the issuance or the continuance of the annual liceuse levied in this section, and in order to secure the payment of the additional per-head tax levied on purchases and/or sales in this section, the Commissioner of Revenue may in his discretion, when it appears reasonably necessary therefor, require any dealer in horses and/or mules, applying for a license under this section, to post a surety bond or other adequate security sufficient to guarantee and secure the payment of any tax due under this section.

(e) Any person, firm, or corporation, required to procure from the Commissioner of Revenue a license under this section, who shall purchase and sell or offer for sale by principal or agent any horses and/or mules without first having obtained such license, or shall fail, neglect or refuse to file any report and pay the additional taxes levied in this section when due and payable, shall in addition to the other penalties imposed by this article, be deemed guilty of a misdemeanor and upon conviction shall be fined not to exceed one hundred dollars (\$100.00) and/or imprisoned not less than thirty (30) days within the discretion of the court.

(f) Counties, cities and towns may levy an annual license tax on the business taxed under this section not in excess of twelve dollars and fifty cents (\$12.50).

(1939, c. 158, s. 115; 1941, c. 50, s. 3.)

Editor's Note. - The 1941 amendment added at the end of the second sentence of the second paragraph of subsection (a) the words "unless sold to a licensed dealer for

the purpose of resale.'

Section Does Not Discriminate against Interstate Commerce.—The license tax imposed on dealers purchasing horses or mules for resale by this section, both in its provisions for graduation according to the number of carloads of horses or mules purchased for resale and the head tax on such animals purchased for resale, is imposed and the exceptions to the head tax are applicable regardless of whether such animals were raised in this State or are shipped into the State from other states, and therefore the statute makes no discrimination between local and interstate commerce. Nesbitt v. Gill, 227 N. C. 174, 41 S. E. (2d) 646 (1947).

Head Tax on Animals Bought for Resale Is Just and Equitable. - The imposition of an additional license tax of \$3.00 per head on horses and mules, required to be paid by dealers purchasing such animals for resale, is a just and equitable manner for determining the amount of license tax to be paid by such dealers, based upon the quantity of business done by them, particularly in view of the fact that such sales have been exempt from the 3% sales tax and the head tax substituted. Nesbitt v. Gill, 227 N. C. 174, 41 S. E. (2d) 646 (1947).

Exemptions from Head Tax Not Unconstitutional. - Under the provisions of this section, a dealer is exempt from the head tax on horses and mules therein imposed: On horses and mules purchased from another dealer within the State who has paid the tax; on horses and mules received in part payment; and on horses and mules repossessed for failure of a purchaser to pay the purchase price, and such exemptions are based upon reasonable distinctions and apply to all dealers alike and therefore do not violate any provisions of the State or federal Constitutions. Nesbitt v. Gill. 227 N. C. 174, 41 S. E. (2d) 646 (1947).

105-48. Phrenologists.—Any person engaged in the practice of phrenology for compensation shall procure from the Commissioner of Revenue a State license for engaging in such practice, and shall pay for same a tax of two hundred dollars (\$200.00) for each county in which such person does business.

Counties, cities, and towns may levy any license tax on the business taxed in

this section. (1939, c. 158, s. 116.)

§ 105-49. Bicycle dealers.—Any person, firm, or corporation engaged in the business of buying and/or selling bicycles, supplies and accessories shall apply for and procure a State license from the Commissioner of Revenue for the privilege of transacting such business, and shall pay tax for such license as follows:

In cities and towns of less than 10,000 population	\$10.00
In cities and towns of 10,000 and less than 20,000 population	20.00
In cities or towns of 20,000 population or more	25.00

Counties shall not levy a license tax on the business taxed under this section. but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 117.)

§ 105-50. Pawnbrokers.—Every person, firm, or corporation engaged in and conducting the business of lending or advancing money or other things of value for a profit, and taking as a pledge for such loan specific articles of personal property, to be forfeited if payment is not made within a definite time, shall be deemed a pawnbroker, and shall pay for the privilege of transacting such business an annual license as follows:

In cities or towns of less than 10,000 population	\$200.00
In cities or towns of 10,000 and less than 15,000 population	250.00
In cities or towns of 15,000 and less than 20,000 population	300.00
In cities or towns of 20,000 and less than 25,000 population	350.00
In cities or towns of 25,000 population or more	400.00

(a) Before such pawnbroker shall receive any article or thing of value from any person or persons, on which a loan or advance is made, he shall issue a duplicate ticket, one to be delivered to the owner of said personal property and the other to be attached to the article, and said ticket shall have an identifying number on the one side, together with the date at the expiration of which the pledger forfeits his right to redeem, and on the other a full and complete copy of this subsection; but such pawnbroker may, after the pledger has forfeited his right to redeem the specific property pledged, sell the same at public auction, deducting from the proceeds of sale the money or fair value of the thing advanced, the interest accrued, and the cost of making sale, and shall pay the surplus remaining to the pledger.

(b) Any person, firm, or corporation transacting the business of pawnbroker without a license as provided in this section, or violating any of the provisions of this section, shall be guilty of a misdemeanor and fined not less than fifty dol-

lars (\$50.00) nor more than five hundred dollars (\$500.00).

(c) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1939, c. 158, s. 118.)

broker is an agent, middleman or negotiator, who works for a commission. A pawnbroker is not an agent at all. He is one

Broker and Pawnbroker Distinguished.

—There is a great difference between the terms "broker" and "pawnbroker." A stitute distinct classes, and entirely different license taxes may be assessed upon them. Schaul & Co. v. Charlotte, 118 N. C. 733, 24 S. E. 526 (1940).

§ 105-51. Cash registers, adding machines, typewriters, refrigerating machines, washing machines, etc.—Every person, firm, or corporation engaged in the business of selling and/or delivering and/or renting cash registers, typewriters, adding or bookkeeping machines, billing machines, check protectors or protectographs, kelvinators, frigidaires, or other refrigerating machines, lighting systems, washing machines, mechanically or electrically operated burglar alarms, addressograph machines, multigraph and other duplicating machines, vacuum cleaners, mechanically or electrically operated oil burners and coal stokers, card punching, assorting and tabulating machinery, shall apply for and procure from the Commissioner of Revenue a State license for each place where such business is transacted in this State, and shall pay for such license a tax of ten dollars (\$10.00).

Counties, cities, and towns shall not levy a license tax on the business taxed

under this section. (1939, c. 158, s. 119.)

- § 105-52. Sewing machines.—(a) Every person, firm, or corporation engaged in the business of selling sewing machines within this State shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business and shall pay for such license a tax of one hundred dollars (\$100.00) per annum for each such make of machines sold or offered for sale.
- (b) In addition to the annual license tax imposed in subsection (a) of this section, such person, firm, or corporation engaged in the business taxed under this section shall pay a tax at the rate of tax levied in schedule E, §§ 105-164 to 105-187, on retail sales of merchandise on the total receipts during the preceding year from the sale, lease, or exchange of sewing machines and/or accessories within the State, which said tax shall be paid to the Commissioner of Revenue at the time of securing the annual license provided for in subsection (a) of this section: Provided, that the tax on sales in the preceding year, levied in this subsection, shall apply only for the fiscal year ending May thirty-first, one thousand nine hundred thirty-five: Provided further, that on and after June first, one thousand nine hundred thirty-five, the additional tax on sales levied in this subsection shall be assessed and collected under the provisions of schedule E, §§ 105-164 to 105-187, the same as the tax on sales of other merchandise.

(c) Any person, firm, or corporation obtaining a license under the foregoing sections may employ agents and secure a duplicate copy of such license for each such agent by paying a tax of ten dollars (\$10.00) to the Commissioner of Revenue. Each such duplicate license so issued shall contain the name of the agent to whom it is issued, shall not be transferable, and shall license the licensee to sell or offer for sale only the sewing machines sold by the holder of

the original license.

(d) Any merchant or dealer who shall purchase sewing machines from a manufacturer or a dealer who has paid the license tax provided for in this section may sell such sewing machines without paying the annual State-wide license tax provided for in subsection (a), but shall procure the duplicate license provided for in subsection (c) of this section: Provided, that the tax imposed by this subsection shall be the only tax required to be paid by dealers in secondhand sewing machines exclusively.

(e) Any person, firm, or corporation who or which violates any of the provisions of this section shall, in addition to all other penalties imposed in this article, pay an additional tax of double the State-wide annual license, and the duplicate

tax imposed in this section.

(f) No county shall levy a license tax on the business taxed under this section, except that the county may levy a license tax not in excess of five dollars (\$5.00) on each agent in a county who holds a duplicate license provided for in this section.

Cities and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 120.)

§ 105-53. Peddlers.—(a) Any person, firm, or corporation who or which shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sells or barters the same, shall be deemed a peddler, except such person, firm, or corporation who or which is a wholesale dealer, with an established warehouse in this State and selling only to merchants for resale, and shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay for such license the following tax:

 (b) Any person, firm, or corporation employing the services of another as a peddler, either on a salary or commission basis, and/or furnishing spices, flavoring extracts, toilet articles, soaps, insecticide, proprietary medicine and household remedies in original packages of the manufacturer and other packaged articles of the kind commonly used on the farm and in the home, to be sold by a peddler, under any kind of contractual agreement, shall be liable for the payment of taxes levied in this section, instead of the peddler.

Provided, however, any person peddling fruits, vegetables, or products of the farm shall pay a license tax of twenty-five dollars (\$25.00) per year, which license shall be State-wide. Counties, cities and towns may levy a tax under this subsection not in excess of one-half of the State tax. Provided, however, no county, city or town shall issue any license, or permit any person, firm, or corporation to do any business under the provisions of this subsection, until and unless such person shall produce and exhibit to the tax collector of such county, city or town, his or its State license for the privilege of engaging in such business.

(c) Any person, firm or corporation who or which sells or offers to sell from a cart, truck, automobile, or other vehicle operated over and upon the streets and/or highways within this State any fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section and shall pay the annual license tax levied in subsection (a) of this section with reference to the character of the vehicle employed. Any person, firm, or corporation who or which sells or offers for sale from any railway car fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section, and shall pay an annual tax of twenty-five dollars (\$25.00). Nothing in this section shall apply to the sale of farm products raised on the premises owned or occupied by the person, firm, or corporation, his or its bona fide agent or employee selling same.

(d) Every itinerant salesman or merchant who shall expose for sale, either on the street or in a building occupied, in whole or in part, for that purpose, any goods, wares or merchandise, not being a regular merchant in such county, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of transacting such business, and shall pay for such license a tax of one hundred dollars (\$100.00) in each county in which he shall

conduct or carry on such business.

Any salesman or merchant, offering for sale goods, wares or merchandise, other than fruits and farm products, shall be deemed an itinerant, within the meaning of this subsection, who conducts said business within the county for less than six consecutive months, except in case of discontinuance for one of the reasons hereinalter mentioned. When any salesman or merchant, beginning said business, does not pay the tax herein levied in advance, on the ground oi stated intention to become a regular merchant, the Commissioner of Revenue may, in his discretion, require said salesman or merchant to post satisfactory bond, or make a cash deposit, in the sum of one hundred dollars (\$100.00), which bond or deposit shall be forfeited in payment of the tax herein levied in case such salesman or merchant discontinues said business in the county within less than six months for any reason other than death or disablement of said salesman or merchant, or insolvency of said business, or destruction of the stock by fire or other catastrophe. In like manner the tax collector of any county or city levying a tax, as permitted by subsection (g), on the business taxed in this subsection, may, in his discretion, require posting of satisfactory bond or cash deposit in an amount equivalent to the tax so levied by said county or city; and said bond or deposit shall in like manner be subject to forfeiture in payment of said tax. Any salesman or merchant failing to post such bond or make such deposit within three days after being notified to do so by the Commissioner or collector, shall immediately become liable for the taxes levied or authorized to be levied on the business taxed in this subsection. When any salesman or merchant, having been required to post such bond or deposit, has conducted said business for six

consecutive months, or has discontinued said business within six months for one of the reasons specifically mentioned herein, he shall be entitled to have said

bond cancelled or said deposit returned.

(e) The provisions of this section shall not apply to any person, firm, or corporation who sells or offers for sale books, periodicals, printed music, ice, wood for fuel, fish, beef, mutton, pork, bread, cakes, pies, products of the dairy, poultry, eggs, livestock, or articles produced by the individual vendor offering them for sale, but shall apply to medicines, drugs, or articles assembled.

(f) The board of county commissioners of any county in this State, upon proper application, may exempt from the annual license tax levied in this section Confederate soldiers, disabled veterans of the Spanish-American War, disabled soldiers of the first and second World Wars, who have been bona fide residents of this State for twelve or more months continuously, and the blind who have been bona fide residents of this State for twelve or more months continuously, widows with dependent children; and when so exempted, the board of county commissioners shall furnish such person or persons with a certificate of exemption, and such certificate shall entitle the holder thereof to peddle within the limits of such county without payment of any license tax to the State.

the limits of such county without payment of any license tax to the State.

(g) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of the annual license levied by the State. But the board of county commissioners of any county may levy a license tax on the business taxed in this section not in excess of that levied by the State for each unincorporated town or village in the county with a population of one thousand or more within a radius of one mile in which such business is engeged in; and any county or city may levy on peddlers of goods, wares, or merchandise with vehicle propelled by motor or other mechanical power, taxed by the State under subsection (a) of this section, a tax not exceeding two hundred dollars (\$200.00) for each vehicle, which said tax may, in the discretion of the governing body, be graduated in accordance with the size or weight of said vehicles, the amount of merchandising space in and on said vehicles, the average value of goods carried, the types of products offered for sale, or any other reasonable principle, except that the tax levied hereunder on account of a vehicle of one-half ton capacity or less shall not exceed twenty-five dollars (\$25.00.)

No county, city, or town shall levy any license tax under this section upon the persons so exempted in this section, nor upon drummers selling by wholesale. (1939, c. 158, s. 121; 1941, c. 50, s. 3; 1943, c. 400, s. 2; 1945, c. 708, s. 2.)

Cross Reference.—As to exemption of gasoline sold to dealers for resale, see § 105-89, subsection (1), subdivision (d).

Editor's Note.—The 1941 amendment struck out former subsection (e), relating to display of samples, etc., in hotel rooms, etc., and relettered the remaining subsections

The 1943 amendment inserted in the first paragraph of subsection (b) a provision as to furnishing merchandise to be sold under

The 1945 amendment rewrote the first paragraph of subsection (b), substituted the words "wood for fuel" for the words "wood or fuel" in subsection (e) and substituted "first and second World Wars" for "World War" in subsection (f).

For comment on the 1943 amendment,

see 21 N. C. Law Rev. 367.

Nature of Peddling.—To peddle is not a matter of right under our laws, which any

person can demand upon the payment of the tax. It is a privilege. It is discretionary with the county commissioners whether or not they will grant a license to a peddler. The privilege is personal to the applicant, and is not assignable. State v. Rhyne, 119 N. C. 905, 26 S. E. 126 (1896).

Power of Legislature.—Under the North Carolina Constitution, Art. V, § 3, the General Assembly may tax trades, etc. The term "trade" includes the business of peddling. Smith v. Wilkins, 164 N. C. 135, 80

S. E. 168 (1913).

Nature of Tax.—Peddlers and transient dealers are commonly taxed a specific sum because they are likely to escape any other tax. A peddler's tax is on the occupation, not on the goods, and one who engages in the business, whether as agent or owner, must pay it. State v. Rhyne, 119 N. C. 905, 26 S. E. 126 (1896).

Peddler Defined. - A peddler is one

who sells and delivers the identical goods he carries about with him. State v. Lee, 113 N. C. 681, 18 S. E. 713 (1893).

A peddler is primarily one who travels around on foot, selling or bartering the identical goods he carries. State v. Frank, 130 N. C. 724, 41 S. E. 785 (1902).

Sales by Samples.—It was held that a former statute, similar to this section, did not apply to sales by sample of goods not at the time of sale within the State and ready for immediate delivery, but applied only where goods were actually exposed and offered for sale, and ready for delivery at once to the purchaser. In re Flinn, 57 F. 496 (1893).

A person who travels from house to house on foot selling goods by sample, and afterwards delivers them on foot, is not a peddler. State v. Frank, 130 N. C. 724, 41 S. E. 785 (1902).

One who sells goods by sample, which goods are shipped to the purchaser in care of one who sold them and delivered by him, is a peddler. State v. Franks, 127 N. C. 510, 37 S. E. 70 (1900).

A picture dealer, who contracts to sell pictures, has them sent out to him, delivers to the purchaser, and receives the price agreed upon beforehand, is no peddler. Greensboro v. Williams, 124 N. C. 167, 32 S. E. 492 (1899).

Selling Fruit in Wholesale Lots.—It

Selling Fruit in Wholesale Lots.—It was held that a former statute, similar to this section, did not apply to a person selling watermelons in wholesale lots in the city of Salisbury, to be shipped from a nearby town, and only delivered to those from whom he had taken orders. State v. Ninestein, 132 N. C. 1039, 43 S. E. 936 (1903).

The words "any articles of the farm," in an earlier statute, were used to embrace all the products of the farm, and a farmer who butchered cattle raised on his farm and sold the beef was not a peddler. State v. Smith, 173 N. C. 772, 92 S. E. 325 (1917).

Statute Not Applicable to Citizens of Other States.—The provision of a statute similar to this was held unconstitutional on the grounds that it was made to apply to citizens of other states, thus regulating interstate commerce. In re Spain, 47 F. 208 (1891). See also, In re Flinn, 57 F. 496 (1893).

Former Subsection Requiring License for Display of Goods by One Not Regular Retailer Was Unconstitutional. — Former subsection (e), requiring one not a regular retail merchant in North Carolina to obtain a \$250 license to entitle him to display goods for purpose of securing orders for retail sale, violated "commerce" clause of federal Constitution as applied to a New York merchandise establishment which rented display room in a North Carolina hotel for several days and took orders for goods corresponding to samples, which orders were filled by shipping direct to customers from New York City, where regular retail merchants in North Carolina were subject to only an annual \$1 license tax for privilege of doing business. Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. 275 (1940). For note on this case, see 18 N. C. Law Rev. 48.

Paragraphs (e) and (g) relate exclusively to privilege taxes upon peddlers. State v. Bridgers, 211 N. C. 235, 189 S. E. 869 (1937).

Subsection (g) Does Not Prohibit City Tax on Trades and Businesses.—A tax levied under the general authority given a city in its charter, authorizing the levying of a tax upon trades and businesses carried on within its corporate limits is not such a tax as is prohibited by subsection (g) of this section. The prohibition relates to license taxes levied "under this section." The tax complained of was not levied "under this section." State v. Bridgers, 211 N. C. 235, 189 S. E. 869 (1937).

Discretion of County Commissioners to Grant Exemptions.—The discretion vested in the county commissioners to exempt from the peddler's tax the "poor and infirm" is necessary to the administration of statutes like this, and will not be interfered with unless arbitrarily exercised. Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168 (1913).

Presumption as to Having License.— The case of State v. Crump, 104 N. C. 763, 10 S. E. 468 (1889), contains a dictum to the effect that if a peddler is required by proper authorities to exhibit his license and he fails to do so the presumption is that he has none.

Cited in Kohn v. Elizabeth City, 199 N. C. 529, 155 S. E. 152 (1930).

§ 105-54. Contractors and construction companies. — (a) Every person, firm, or corporation who, for a fixed price, commission, fee, or wage, offers or bids to construct within the State of North Carolina any building, highway, street, sidewalk, bridge, culvert, sewer or water system, drainage or dredging system, electric or steam railway, reservoir or dam, hydraulic or power plant, transmission line, tower, dock, wharf, excavation, grading or other improvement

or structure, or any part thereof, the cost of which exceeds the sum of ten thousand dollars (\$10,000.00), shall apply for and obtain from the Commissioner of Revenue an annual State-wide license, and shall pay for such license a tax of one hundred dollars (\$100.00) at the time of or prior to offering or submitting

any bid on any of the above enumerated projects.

(b) In addition to the tax levied in subsection (a) of this section, every person, firm, or corporation who, for a fixed price, commission, fee, or wage, undertakes or executes a contract for the construction, or who superintends the construction of any of the above enumerated projects, shall, before or at the time of entering into such projects and/or such contract, apply for and procure from the Commissioner of Revenue a State-wide license, and shall pay for such license the following tax:

When the total contract price or estimated cost of such project is over:

\$ 5,000	and	not	more	than	\$ 10,000			 	 	 			 	\$ 25.00
10,000	and	not	more	than	\$ 50,000			 	 	 			 0	50.00
					100,000									
					250,000									
250,000	and	not	more	than	\$ 500,000		 	 	 	 				300.00
500,000	and	not	more	than	\$ 750,000			 		 				400.00
					,000,000									
1,000,000					 		 		 		 	 		625.00

(c) The application for license under subsection (b) of this section shall be made to the Commissioner of Revenue and shall be accompanied by the affidavit of the applicant, stating the contract price, if known, and if the contract price is not known, his estimate of the entire cost of the said improvement or structure, and if the applicant proposes to construct only a part of said improvement or structures, the contract price, if known, or his estimated cost of the part of the project he proposes to superintend or construct.

In the event the construction of any of the above-mentioned improvements or structures shall be divided and let under two or more contracts to the same person, firm, or corporation, the several contracts shall be considered as one contract for the purpose of this article, and the Commissioner of Revenue shall collect from such person, firm, or corporation the license tax herein imposed as if only one contract had been entered into for the entire improvement or structure.

(d) In the event any person, firm, or corporation has procured a license in one of the lower classes provided for in subsection (b) of this section, and constructs or undertakes to construct or to superintend any of the above-mentioned improvements or structures or parts thereof, the completed cost of which is greater than that covered by the license already secured, application shall be made to the Commissioner of Revenue, accompanied by the license certificate held by the applicant, which shall be surrendered to the Commissioner of Revenue, and upon paying the difference between the cost of the license surrendered and the price of the license applied for, the Commissioner of Revenue shall issue to the applicant the annual State-wide license applied for, showing thereon that it was issued on the surrender of the former license and payment of the additional tax.

(e) No employee or subcontractor of any person, firm, or corporation who or which has paid the tax herein provided for, shall be required to pay the license tax provided for in this section while so employed by such person, firm, or

corporation.

(f) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy an annual contractor's license tax not in excess of ten dollars (\$10.00) when the license provided for under this section has been paid: Provided, that this subsection shall not be construed to prevent the collection of building, electrical, and plumbing inspection charges by municipalities to cover the actual cost of said inspection.

(g) The tax under this section shall not apply to the business taxed in § 105-91. (1939, c. 158, s. 122.)

§ 105-55. Installing elevators and automatic sprinkler systems.— Every person, firm, or corporation engaged in the business of selling or installing elevators or automatic sprinkler systems shall apply for and procure from the Commissioner of Revenue an annual State-wide license for the transaction of such business in this State, and shall pay for such license a tax of one hundred dollars (\$100.00).

(a) Counties, cities, and towns in which there is located a principal office or a branch office may levy a tax on the business taxed under this section not in

excess of that levied by the State.

Provided, however, no county, city, or town may collect tax under this section from any person, firm, or corporation who or which does not maintain an established place of business in said county, city or town.

(b) The businesses taxed and licensed hereunder shall not be liable for any tax

or license levied under § 105-91. (1939, c. 158, s. 1221/2.)

§ 105-56. Repairing and servicing elevators and automatic sprinkler systems.—Every person, firm, or corporation engaged in the business of repairing or servicing elevators or automatic sprinkler systems, shall apply for and procure from the Commissioner of Revenue, an annual State-wide license for the transaction of such business in this State and shall pay for such license the following tax based on population:

Municipalities of less than two thousand population	\$ 5.00
Municipalities of more than two thousand and less than five thousand non-	
ulation	7.50
Municipalities of more than five thousand and less than ten thousand pop-	
Municipalities of more than to all	10.00
Municipalities of more than ten thousand and less than twenty thousand	10 40
population	12.50
population	15.00
Municipalities of more than thirty thousand and less than forty thousand	15.00
population	17.50
Municipalities of more than forty thousand and less than fifty thousand	17,00
population	20.00
Municipalities of more than fifty thousand population	25.00
(a) Counting side to	

(a) Counties, cities and towns in which there is located a principal office or a branch office may levy a tax on the business taxed under this section not in excess of that levied by the State.

Provided, however, no county, city or town may collect tax under this section from any person, firm, or corporation who, or which, does not maintain an estab-

lished place of business in said county, city or town.

(b) If any person, firm, or corporation, required to be licensed under the provisions of this section, engages in said business in two or more cities or towns, such person, firm or corporation shall procure a license based on the population of the largest city or town in which the business taxed under this section is carried on.

(c) The tax under this section shall not apply to the business taxed in §§ 105-55 and 105-91. (1939, c. 158, s. 1223/4; 1947, c. 501, s. 2.)

Editor's Note.—The 1947 amendment tion and redesignated former subsection added present subsection (b) to this sec- (b) as (c).

§ 105-57. Mercantile agencies.—(a) Every person, firm or corporation engaged in the business of reporting the financial standing of persons, firms or

corporations for compensation shall be deemed a mercantile agency, and shall apply for and procure from the Commissioner of Revenue a State-wide license for the privilege of transacting such business within this State, and shall pay for such license a tax of five hundred dollars (\$500.00), the said tax to be paid by the principal office in the State, and if no such principal office in this State, then by the agent of such mercantile agency operating in this State: Provided, however, that mercantile agencies not publishing a State-wide credit or financial rating book shall pay only an annual tax of one hundred dollars (\$100.00).

(b) Any person representing any mercantile agency which has failed to pay the license tax provided for in this section shall be guilty of a misdemeanor and

fined and/or imprisoned in the discretion of the court.

(c) Counties, cities, or towns shall not levy any license tax on mercantile agencies, as herein defined. (1939, c. 158, s. 123; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment rewrote this section.

- § 105-58. Gypsies and fortune tellers.—(a) Every company of gypsies or strolling bands of persons, living in wagons, tents, or otherwise, who or any of whom trade horses, mules, or other things of value, or receive reward for telling or pretending to tell fortunes, shall apply for in advance and procure from the Commissioner of Revenue a State license for the privilege of transacting such things, and shall pay for such license a tax of five hundred dollars (\$500.00) in each county in which they offer to trade horses, mules, or other things of value, or to practice the telling of fortunes or any of their crafts. The amount of such license tax shall be recoverable out of any property belonging to any member of such company.
- (b) Any person or persons, other than those mentioned in subsection (a) of this section, receiving rewards for pretending to tell and/or telling fortunes, practicing the art of palmistry, clairvoyance and other crafts of a similar kind, shall apply for in advance and procure from the Commissioner of Revenue a State license for the privilege of practicing such arts or crafts, and shall pay for such license a tax of two hundred dollars (\$200.00) for each county in which they offer to practice their profession or crafts: Provided, that the tax levied under this section shall not apply to fortune tellers or other artists practicing the art of palmistry, clairvoyance, and other crafts of a similar kind, when appearing under contract in regularly licensed theatres taxed under § 105-37.

(c) Counties, cities, and towns may levy any license tax on the business taxed

in this section. (1939, c. 158, s. 124; 1945, c. 708, s. 2.)

Editor's Note.—The 1945 amendment, effective June 1, 1945, rewrote subsection (c).

- § 105-59. Lightning rod agents.—(a) No manufacturer or dealer, whether person, firm, or corporation, shall sell, or offer for sale, in this State any brand of lightning rod, and no agent of such manufacturer or dealer shall sell, or offer for sale, or erect any brand of lightning rod until such brand has been submitted to and approved by the Insurance Commissioner and a license granted for its sale in this State. The fee for such license, including seal, shall be fifty dollars (\$50.00).
- (b) Upon written notice from any manufacturer or dealer licensed under the preceding subsection of the appointment of a suitable person to act as his agent in this State, and upon filing an application for license upon the prescribed form, the Insurance Commissioner may, if he is satisfied as to the reputation and moral character of such applicant, issue him a license as general agent of such manufacturer or dealer. Said license shall set forth the brand of lightning rod licensed to be sold, and the fee for such license, including seal, shall be fifty dollars (\$50.00).

(c) Such general agent may appoint local agents to represent him in any county in the State by paying to the Insurance Commissioner a fee of ten dollars (\$10.00) for each such county. Upon filing application for license of such local agent on a prescribed form and paying him a fee of three dollars (\$3.00) for each county in which said applicant is to operate, the Insurance Commissioner may, if he is satisfied that such applicant is of good repute and moral character, and is a suitable person to act in such capacity, issue him a license to sell and erect any brand of lightning rod approved for sale by the general agent in such county applied for.

(d) Each general agent shall submit to the Insurance Commissioner semiannually, on January thirty-first and July thirty-first, on prescribed forms, a sworn statement of gross receipts from the sale of lightning rods in this State during the preceding six months, and pay a tax thereon of eighty cents (80c) on each one hundred dollars (\$100.00), such returns to be accompanied by an itemized list showing each sale, the county in which sold, and the agent making

the sale.

(e) No county, city, or town shall levy a license or privilege tax exceeding twenty dollars (\$20.00) on any dealer having a general office or selling from a receiving point.

(f) Licenses issued under this section are not transferable, are valid for only one person, and revocable by the Insurance Commissioner for good cause after

hearing.

- (g) Every agent licensed under this section shall, upon demand, exhibit his license to any officer of the law or citizen, and any person, firm, or corporation acting without a license or selling or offering for sale any brand of lightning rod not approved by the Insurance Commissioner, or otherwise violating any of the provisions of this article, shall be punished by a fine of not more than two hundred dollars (\$200.00) and/or six months imprisonment for each offense. (1939, c. 158, s. 125.)
- § 105-60. Hotels. Every person, firm, or corporation engaged in the operation of any hotel in this State shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay for such license the following tax:

(a) For hotels operating on the American plan for rooms in which rates per

person per day are:

Less than two dollars	\$0.60
Two dollars and less than three dollars	
Three dollars and less than four dollars and fifty cents	1.80
Four dollars and fifty cents and less than six dollars	4.20
Six dollars and less than seven dollars and fifty cents	5.40
Seven dollars and fifty cents and less than fifteen dollars	
Fifteen dollars and over	7.20

(b) For hotels operating on the European plan for rooms in which the rates per person per day are:

For Portion Por day are.	
Less than two dollars	\$1.25
Two dollars and less than three dollars	3.00
Three dollars and less than four dollars and fifty cents	4.50
Four dollars and fifty cents and less than six dollars	5.50
Six dollars and less than seven dollars and fifty cents	6.50
Seven dollars and fifty cents and less than ten dollars	7.50
Ten dollars and over	8.50

(c) The office, dining room, one parlor, kitchen, and two other rooms shall not be counted when calculating the number of rooms in the hotel.

(d) Only one-half of the annual license tax levied in this section shall be levied or collected from resort hotels and boardinghouses which are open for only six months or less in the year: Provided, that the minimum tax under any schedule in the section shall be five dollars (\$5.00).

(e) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the State. (1939, c. 158, s. 126; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment directed that the words "over fifteen dollars" in the last line of subsection (a) be struck out and the words "fifteen dollars and over" be inserted in lieu thereof. It also directed that the words "ten dollars and over" be substituted for "over ten dollars" in the last line of subsection (b). These changes had already been made upon the codification of this section.

For comment on the 1943 amendment,

see 21 N. C. Law Rev. 367.

Tax May Be Exacted of Lessee.—Where a corporation chartered for the purpose of owning and conducting a hotel has paid the franchise tax, the lessee of such corporation is not relieved thereby from paying the tax imposed upon the business of conducting a hotel. Cobb v. Commissioners, 122 N. C. 307, 30 S. E. 338 (1898).

§ 105-61. Tourist homes and tourist camps.—(a) Every person, firm, or corporation engaged in the business of operating a tourist home, tourist camp, or similar place advertising in any manner for transient patronage, or soliciting such business, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall

pay the following tax:

Homes or camps having five rooms or less, ten dollars (\$10.00); houses or camps having more than five rooms, two dollars (\$2.00) per room. For the purpose of this section, the sitting room, dining room, kitchen, and rooms occupied by the owner or lessee of the premises, or members of his family, for his or their personal or private use, shall not be counted in determining the number of rooms for the basis of the tax. The tax herein levied shall be in addition to any tax levied in § 105-62 for the sale of prepared food.

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of

the base tax levied by the State. (1939, c. 158, s. $126\frac{1}{2}$.)

§ 105-62. Restaurants.—Every person, firm, or corporation engaged in the business of operating a restaurant, cafe, cafeteria, hotel, with dining service on the European plan, drugstore, or other place where prepared food is sold, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business. The tax for such license shall be based on the number of persons provided with chairs, stools, or benches, and shall be one dollar (\$1.00) per person, with a minimum tax of five dollars (\$5.00): Provided, that the tax levied in this paragraph shall not apply to industrial plants maintaining a nonprofit restaurant, cafe or cafeteria solely for the convenience of its employees.

(a) All other stands or places where prepared food is sold as a business, and drugstores, service stations, and all other stands or places where prepared sand-

wiches only are served, shall pay a tax of five dollars (\$5.00).

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the State. (1939, c. 158, s. 127.)

§ 105-63. Cotton compresses.—Every person, firm, or corporation engaged in the business of compressing cotton shall pay an annual license tax of three hundred dollars (\$300.00) on each and every compress.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by

the State. (1939, c. 158, s. 128.)

§ 105-64. Billiard and pool tables.—Every person, firm or corporation who shall rent, maintain, own a building wherein there is a table or tables at which billiards or pool is played, whether operated by slot or otherwise, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of operating such billiard or pool tables, and shall pay for such license a tax for each table as follows:

Tables measuring not more than 2 feet wide and 4 feet long	\$ 5.00
Tables measuring not more than $2\frac{\pi}{2}$ feet wide and 5 feet long	10.00
Tables measuring not more than 3 feet wide and 6 feet long	15.00
Tables measuring not more than $3\frac{1}{2}$ feet wide and 8 feet long	20.00
Tables measuring more than $3\frac{1}{2}$ feet wide and 8 feet long	25.00

Provided, each such billiard or pool table so licensed shall receive a number and receipt from the Commissioner of Revenue when the license is issued, and it shall be the duty of each operator to attach said numbered license to said table or machine and display the same at all times. Failure to have such license and receipt on display attached to said machine or table shall be prima facie evidence that the tax has not been paid hereunder.

(a) This section shall not apply to fraternal organizations having a national charter, American Legion Posts, or posts or other local organizations of other veterans' organizations chartered by Congress or organized and operating on a State-wide or nation-wide basis, Young Men's Christian Associations, and Young

Women's Christian Associations.

- (b) If the Commissioner of Revenue shall have issued any such State license to any person, firm, or corporation to operate any billiard or pool tables in any city or town, the board of aldermen or other governing body of such city or town shall have the right at any time, and notwithstanding the issuance of such State license, to prohibit any billiard or pool tables within its limits, unless otherwise provided in its charter; and in the event any city or town shall exercise the right to prohibit the keeping and operation of such billiard or pool tables, the Commissioner of Revenue shall refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid. And, where the Commissioner of Revenue has issued any such license and the said billiard or pool tables is or are to be, or are operated outside of the corporate limits of any incorporated city or town, the board of county commissioners may by resolution request that such license be revoked, and upon receipt of such resolution the Commissioner of Revenue shall forthwith revoke said license and refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid.
- (c) Counties may levy a license tax on the business taxed under this section upon such billiard or pool tables as are located outside of incorporated cities or towns, and cities and towns may levy a license tax upon such as are within the city limits, but in neither case shall the license tax so levied be in excess of the tax levied by the State. (1939, c. 158, s. 129; 1943, c. 400, s. 2; 1945, c. 995, s. 1.)

ment this section also applied to bowling alleys, which are now covered by § 105-

The 1945 amendment inserted in subsection (a) the reference to "other veterans' organizations."

Constitutionality.—A license tax imposed upon a business is not void as contravening the State Constitution upon the theory that the statute gives an invalid arbitrary power to the county commissioners with

Editor's Note.—Prior to the 1943 amend- reference to the issuance of the license among applicants therefor, as to locality or otherwise; and the tax so imposed will nevertheless remain, these different portions of the law not being so interdependent that one must fall with the other. Brunswick-Balke-Collender Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317 (1921).

> Same-License without City Limits.-Billiard and pool tables kept open for indiscriminate use by the public are liable to

become a source of disorder and demoralization, coming within the police powers, and requiring, in the nature of the business, that power be lodged in some governmental board to withhold or revoke a license imposed by statute for the conduct of the business, and such power lodged in the board of county commissioners, differentiating as to licenses to be issued within and without the city limits, the latter not subject to the same degree of police pro-

tection, and requiring a greater license fee, and certain publicity before the license may be issued, etc., is not an unconstitutional discrimination, or the exercise of an invalid arbitrary power, the decision of the commissioners being reviewable in the courts upon the question of whether this power has been arbitrarily and unjustly exercised. Brunswick-Balke-Collender Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317 (1921).

§ 105-64.1. Bowling alleys. — Every person, firm, or corporation who shall rent, maintain, or own a building wherein, or any premises on which, there is a bowling alley or alleys of like kind shall apply for and procure from the Commissioner of Revenue a State license for the privilege of operating such bowling alley or alleys, and shall pay for such license a tax of ten dollars (\$10.00) for each alley kept or operated.

(a) This section shall not apply to fraternal organizations having a national charter, American Legion Posts, Young Men's Christian Associations, and

Young Women's Christian Associations.

(b) If the Commissioner of Revenue shall have issued any such State license to any person, firm, or corporation to operate any bowling alley or alleys, in any city or town, the board of aldermen or other governing body of such city or town shall have the right at any time, and notwithstanding the issuance of such State license, to prohibit any bowling alley or alleys of like kind within its limits, unless otherwise provided in its charter; and in the event any city or town shall exercise the right to prohibit the keeping and operation of such bowling alley or alleys of like kind, the Commissioner of Revenue shall refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid. And, where the Commissioner of Revenue has issued any such license and the said bowling alley or alleys is or are to be, or are operated outside of the corporate limits of any incorporated city or town, the board of county commissioners may by resolution request that such license be revoked, and upon receipt of such resolution the Commissioner of Revenue shall forthwith revoke said license and refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid.

(c) Counties may levy a license tax on such bowling alley or alleys of like kind as are located outside of incorporated cities or towns, and cities and towns may levy a license tax upon such as are within the city limits, but in neither case shall the license tax so levied be in excess of the tax levied by the State. (1943,

c. 400, s. 2; 1947, c. 501, s. 2.)

Editor's Note.—The 1947 amendment inserted the words "or any premises on which" in the first paragraph.

§ 105-65. Music machines.—(1) Every person, firm, or corporation engaged in the business of operating, maintaining, or placing on location anywhere within the State of North Carolina, any machine or machines which plays records, or produces music, shall apply for and procure from the Commissioner of Revenue a State-wide license to be known as an annual operator's license, and shall pay for such license the sum of one hundred (\$100.00) dollars.

(2) In addition to the above annual operator's license, every person, firm, or corporation operating any of the above machines, shall apply for and obtain from the Commissioner of Revenue, what shall be termed an annual State-wide license for each machine operated and shall pay therefor the sum of ten (\$10.00)

dollars.

- (3) The applicant for license under this section shall, in making application for license, specify the serial number of the machine or machines proposed to be operated, together with a description of the service offered for sale thereby, and the amount of deposit required by or in connection with the operation of such machine or machines. The license shall carry the serial number to correspond with that on the application, and no such license shall under any condition be transferable to any other machines. It shall be the duty of the person in whose place of business the machine is operated or located to see that the proper State license is attached in a conspicuous place on the machine before its operation shall
- (4) If any person, firm, or corporation shall fail, neglect or refuse to comply with the terms and provisions of this section, or shall fail to attach the proper State license to any machine as herein provided, the Commissioner of Revenue, or his agents, or deputies, shall forthwith seize and remove such machine, and shall hold the same until the provisions of this section have been complied with. In addition to the above provision the applicant shall be further liable for the additional tax imposed under § 105-112.

(5) Counties, cities and towns may levy and collect a license tax not in excess of fifty per cent (50%) of the total amount collected by the State from music machines: Provided, that counties, cities and towns shall not levy and collect an annual operator's occupational license levied for the operation of the

above machines.

(6) Counties, cities and towns levying a tax under the provisions of this section shall have power through their tax collecting officers, upon nonpayment of the tax levied by them, or of any interest or penalty thereon, or upon failure to attach the evidence of license issued by them to any such machines, to seize, remove and hold such machines until all such defaults have been remedied. (1939, c. 158, s. 130; 1941, c. 50, s. 3; 1943, c. 105; c. 400, s. 2; 1945, c. 708, s. 2.)

Editor's Note. — The 1945 amendment machines, which are now covered by § 105rewrote this section as changed by the 1941 and 1943 amendments. Prior to the 1945 amendment this section applied also to merchandising dispensers and weighing

65.1.

Cited in State v. Finch, 218 N. C. 511, 11 S. E. (2d) 547 (1940).

105-65.1. Merchandising dispensers and weighing machines.— (1) Every person, firm or corporation engaged in the business of operating, maintaining or placing on location anywhere within the State of North Carolina any merchandising dispenser, in which is kept any article or merchandise to be purchased, or any weighing machine, shall apply for and procure from the Commissioner of Revenue a State-wide license to be known as an annual distributor's or operator's license, and shall pay for such license the following tax:

Distributors or operators of cigarette dispensers or dispensers of other tobacco products \$100.00 Distributors or operators of drink dispensers Distributors or operators of food or other merchandising dispensers 25.00 Distributors or operators of weighing machines

(2) In addition to the above annual distributor's or operator's license, every person, firm or corporation distributing or operating any of the above dispensers or machines shall apply for and obtain from the Commissioner of Revenue what shall be termed a State-wide license for each dispenser or machine operated, and shall pay therefor the following annual tax:

Cigarette dispensers or dispensers of other tobacco products	\$ 5.00
Drink dispensers	15.00
One-cent food or merchandising dispensers	.50
Five-cent food or merchandising dispensers	1.00
Weighing machines	2.50

Provided, that the above tax on food or merchandising dispensers shall not apply to dispensers that yend solely peanuts, neither shall the tax apply to dispensers that yend no other commodity than candy containing fifty per cent (50%) or more peanuts, nor to penny self-service dispensers or machines contributing twenty per cent (20%) of their gross revenue to work for the visually handicapped. The applicant for license under this section shall, in making application for license, specify the serial number of the dispenser, or dispensers, and of the weighing machine, or machines, proposed to be distributed or operated, together with a description of the merchandise or service offered for sale thereby, and the amount of deposit required by or in connection with the operation of such dispenser, or dispensers, and such machine, or machines. The license shall carry the serial number to correspond with that on the application, and no such license shall under any condition be transferable to any other dispensers or machines. It shall be the duty of the person in whose place of business the dispenser or machine is operated or located to see that the proper State license is attached in a conspicuous place on the dispenser or machine before its operation shall commence. Provided, that when application is made under this section for license to operate a machine dispensing bottled drinks or cigarettes, the applicant for such license shall pay or cause to be paid the license fee provided for under §§ 105-79 and 105-84, as the case may be.

- (3) If any person, firm, or corporation shall fail, neglect or refuse to comply with the terms and provisions of this section or shall fail to attach the proper State license to any dispenser or machine as herein provided, the Commissioner of Revenue, or his agent or deputies, shall forthwith seize and remove such dispenser or machine, and shall hold the same until the provisions of this section have been complied with. In addition to the above provision the applicant shall be further liable for the additional tax imposed under § 105-112.
- (4) Sales of merchandise herein referred to shall be subject to the provisions of Article V, Scheduie "E", §§ 105-164 to 105-187, and the tax therein levied shall be paid by the distributor or operator of such dispensers or machines.
- (5) Counties, cities and towns may levy and collect a license tax not in excess of fifty per cent (50%) of the total amount collected by the State from weighing machines: Provided, that counties, cities and towns shall not levy and collect an annual distributor's or operator's occupational license levied for the distribution or operation of the above named dispensers and machines, neither shall any county, city or town levy and collect any tax whatsoever from distributors and operators of soft drink dispensers and one-cent and five-cent food dispensers: Provided, further, that counties, cities and towns shall not levy and collect any per dispenser or machine license tax from distributors or operators of cigarette dispensers, or dispensers of other tobacco products. Counties, cities and towns may levy and collect an annual distributor's or operator's occupational license on cigarette dispensers not in excess of ten (\$10.00) dollars.
- (6) Counties, cities and towns levying a tax under the provisions of this section shall have power through their tax collecting officers, upon nonpayment of the tax levied by them, or of any interest or penalty thereon, or upon failure to attach the evidence of license issued by them to any such dispensers or machines, to seize, remove and hold such dispensers or machines until all such defaults have been remedied.
- (7) The word "dispenser" or "dispensers" as used in this section shall include any machine or mechanical device through the medium of which any of the merchandise referred to in this section is purchased, distributed or sold.
- (8) Neither the tax levied under subsection (2) upon dispensers, nor the tax levied under subsection (1) upon distributors or operators, shall apply to dispensers or vending machines which dispense only milk, milk drinks, products of the dairy, or pure uncarbonated fruit or vegetable juices. (1939, c. 158, s.

130; 1941, c. 50, s. 3; 1943, c. 105; c. 400, s. 2; 1945, c. 708, s. 2; 1949, c. 1220, s. 1.)

Editor's Note.—Prior to the 1945 amendment, merchandising dispensers and weighing machines were covered by § 105-65, as changed by the 1941 and 1943 amendments. The 1949 amendment added subsection (8).

Subsections Construed in Pari Materia.

—In referring to this section, as it appeared in § 105-65 prior to the 1941 amendment, it was held that all of the subsections of the section must be construed in pari materia. Snyder v. Maxwell, 217 N. C. 617, 9 S. E. (2d) 19 (1940).

Tax on Vendors of Soft Drinks Is Based on Reasonable Classification.—The provision of this section imposing a license tax on the privilege of operating a vending machine selling soft drinks at the retail price of five cents while imposing a smaller tax on vending machines selling other kinds of merchandise at the same price, prescribes classifications based upon real and reasonable distinctions, since it is a matter of common knowledge that the sale of soft drinks has obtained a unique

commercial place, affording unusual opportunities for gainful returns, thus justifying the imposition of a higher license tax upon the privilege of selling this kind of merchandise by vending machine. Snyder v. Maxwell, 217 N. C. 617, 9 S. E. (2d) 19 (1940), construing this section when it appeared as a part of § 105-65 prior to the 1941 amendment.

Criminal Provisions Not Repealed.—The provisions of the Flanagan Act, Public Laws 1937, c. 196 (§ 14-304 et seq.), proscribing the possession and distribution of a coin slot machine in the operation of which the user could secure additional chances or rights to use the machine, were not repealed by this section as it read when a part of § 105-65 prior to the 1941 amendment. State v. Abbott, 218 N. C. 470, 11 S. E. (2d) 539 (1940), followed in 218 N. C. 480, 11 S. E. (2d) 545 (1940).

Enjoining Criminal Law.—As to enjoining statute proscribing slot machines, see McCormick v. Proctor, 217 N. C. 23, 6 S. E. (2d) 870 (1940).

§ 105-66. Bagatelle tables, merry-go-rounds, etc. — Every person, firm, or corporation that is engaged in the operation of a bagatelle table, merry-go-round or other riding device, hobby horse, switchback railway, shooting gallery, swimming pool, skating rink, other amusements of a like kind, or a place for other games or play with or without name (unless used solely and exclusively for private amusement or exercise), at a permanent location, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of operating such objects of amusement, and shall pay for each subject enumerated the following tax:

(a) The tax under this section shall not apply to machines and other devices licensed under §§ 105-64 and 105-65.

(b) Counties, cities or towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1939, c. 158, s. 131.)

§ 105-67. Security dealers.—(a) Every person, firm, or corporation who or which is engaged in the business of dealing in securities as defined in §§ 78-1 to 78-24, or who or which maintains a place for or engages in the business of buying and/or selling shares of stock in any corporation, bonds, or any other securities on commission or brokerage, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay for such license the following tax:

In cities or towns of less than 5,000 population	\$ 25.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 15,000 population	100.00
In cities or towns of 15,000 and less than 25,000 population	200.00
In cities or towns of 25,000 population and above	300.00

(b) Every dealer, as defined herein, who shall maintain in the State of North Carolina more than one office for dealing in securities, as hereinbefore defined,

shall apply for and procure from the Commissioner of Revenue a license for the privilege of transacting such business at each such office, and shall pay for such license the same tax as hereinbefore fixed.

(c) Every foreign dealer, as dealer is hereinbefore defined, who shall maintain an office in this State, or have a salesman in this State, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay for such license the tax hereinbefore imposed.

(d) If such person, firm, or corporation described in subsection (a) of this section maintains and/or operates a leased or private wire and/or ticker service in connection with such business the annual license tax shall be as follows:

In cities and towns of less than 10,000 population	\$150.00
In cities and towns of 10,000 and less than 15,000 population	250.00
In cities and towns of 15,000 and less than 20,000 population	
In cities and towns of 20,000 to 25,000 population	
In cities and towns of 25,000 or more	

Provided, that the tax levied in subsection (d) shall not apply to private wire service not connected with or handling quotations of a stock exchange, grain or cotton exchange.

(e) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars (\$50.00). (1939, c. 158, s. 132.)

§ 105-68. Cotton buyers and sellers on commission.—(1) Every person, firm, or corporation who or which engages in the business of buying and/or selling on commission any cotton, grain, provisions, or other commodities, either for actual, spot, or instant delivery, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business in this State, and shall pay for such license a tax of fifty dollars (\$50.00).

(2) Every person, firm, or corporation who or which engages in the business of buying or selling any cotton, grain, provisions, or other commodities, either for actual, spot, instant or future delivery, and also maintains and/or operates a private or leased wire and/or ticker service in connection with such business shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business in this State and shall pay for such license the following tax:

In cities and towns of less than 10,000 population	\$100.00
In cities and towns of 10,000 and less than 15,000 population	
In cities and towns of 15,000 and less than 25,000 population	400.00
In cities and towns of 25,000 population or more	600.00

Persons, firms, and corporations who pay the tax imposed in subsection (d) of § 105-67 shall not be required to pay the tax imposed in this subsection.

(3) Every person, firm, or corporation, domestic or foreign, who or which is engaged in the business of selling any cotton either for actual, spot, instant, or future delivery, in excess of five thousand bales per annum, shall be deemed to be a cotton merchant, shall apply for and obtain from the Commissioner of Revenue a State-wide license for each office or agency maintained in this State for the sale of cotton and shall pay for each such license the following tax:

In cities and towns of less than 10,000 population	. \$ 50.00
In cities and towns of 10,000 and less than 15,000 population	
In cities and towns of 15,000 and less than 25,000 population	
In cities and towns of 25,000 population and over	, 300.00

(4) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars (\$50.00). (1939, c. 158, s. 133.)

§ 105-69. Manufacturers, producers, bottlers and distributors of soft drinks.—(a) Every person, firm, or corporation or association manufacturing, producing, bottling and/or distributing in bottles, or other closed containers, soda water, coca-cola, pepsi-cola, chero-cola, ginger ale, grape and other fruit juices or imitations thereof, carbonated or malted beverages and like preparations. or preparations of any nature whatever commonly known as soft drinks, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of doing business in this State, and shall pay for such license the following base tax for each place of business:

Low-Pressure Equipment

Where the machine or the equipment unit used in the manufacture of the above beverage is a:

51	spouts or greater capacity, low pressure filler	\$1,800.00
	spouts and less than 51 spouts, low pressure filler	
36	spouts and less than 41 spouts, low pressure filler	1,200.00
	spouts and less than 36 spouts, low pressure filler	
24	spouts and less than 32 spouts, low pressure filler	700.00
	spouts and less than 24 spouts, low pressure filler	
12	spouts and less than 18 spouts, low pressure filler	175.00

Provided, that counter-pressure or pre-mix fillers shall be deemed to have the following equivalent capacities and shall be taxed in accordance with the above schedule upon the basis of the nearest equivalent capacity; 24 spout pre-mix, equivalent to 40 spout low-pressure; 34 spout pre-mix, equivalent to 50 spout low-pressure; 40 spout pre-mix, equivalent to 60 spout low-pressure. For a 50 spout counter-pressure or pre-mix filler, the tax shall be two thousand and one hundred dollars (\$2,100.00).

High-Pressure Equipment

Where the machine or the equipment unit used in the manufacture of the above mentioned beverages is a Royal (8-head), Shields (6-head), Adriance (6-head), or other high-pressure equipment having manufacturer's rating capacity of over sixty bottles per minute, one thousand two hundred dollars (\$1,200.00).

Royal (4-head), Adriance (2-head), Shields (2-head), full equipment having manufacturer's rating capacity of over fifty and less than sixty bottles per minute,

one thousand dollars (\$1,000.00).

Royal (4-head), Adriance (2-head), Shields (2-head) (full automatic), or other high-pressure equipment having manufacturer's rating capacity of more than forty and less than fifty bottles per minute, seven hundred dollars (\$700.00).

Dixie (automatic), Shields (2-head hand feed), Adriance (1-head), Calleson (1-head), Senior (high-pressure), Junior (high-pressure), or Burns or other high-pressure equipment having manufacturer's rating capacity of more than twenty-four bottles and less than forty bottles per minute, one hundred five dollars (\$105.00).

Single-head Shields, Modern Bond (power), Baltimore (semi-automatic), and all other machines or equipment having manufacturer's rating capacity of less than twenty-four bottles per minute and all foot-power bottling machines, seventy dollars (\$70.00).

Provided, that any bottling machine or equipment unit not herein specifically mentioned shall bear the same tax as a bottling machine or equipment unit of the nearest rated capacity as herein enumerated: Provided further, that where any person, firm, corporation, or association has within his or its bottling plant or place of manufacture more than one bottling machine or equipment unit, then such person, firm, corporation, or association shall pay the tax as herein specified

upon every such bottling machine or equipment unit if in actual operation: Provided further, that where no standard high or low-pressure bottling machine is used to fill the containers, a tax of fifty dollars (\$50.00) shall apply. The tax levied in this section shall not apply to any product containing more than fifty per cent (50%) of milk, put up in containers for sale as food rather than soft drink preparations.

(b) Every person, corporation, or association distributing, selling at wholesale. or jobbing bottled beverages as enumerated in subsection (a) of this section shall pay an annual license tax for the privilege of doing business in this State, as fol-

lows:

In	cities or towns of 30,000 inhabitants or more	\$100.00
In	cities or towns of 20,000 inhabitants and less than 30,000 inhabitants	90.00
In	cities or towns of 10,000 inhabitants and less than 20,000 inhabitants	80.00
In	cities or towns of 5,000 inhabitants and less than 10,000 inhabitants	70.00
	cities and towns of 2,500 inhabitants and less than 5,000 inhabitants	60.00
In	rural districts and towns of less than 2,500 inhabitants	50.00

The tax levied in this subsection shall not include the right to sell products author-

ized to be sold under Schedule F, §§ 18-63 to 18-92.

(c) Every distributing warehouse selling or supplying to retail stores cereal or carbonated beverages manufactured or bottled within the State, but outside of the county in which such cereal or carbonated beverages are manufactured or bottled. shall pay one-half of the annual license tax for the privilege of doing business in this State provided for in subsection (b) of this section.

(d) Every distributing warehouse selling or supplying to retail stores cereal or carbonated beverages on which the tax has not been paid under the provisions of subsection (a) of this section shall pay the annual license tax for the privilege of doing business in the State provided in subsection (b) of this section.

(e) Each truck, automobile, or other vehicle coming into this State from another state, and selling and/or delivering carbonated beverages on which the tax has not been paid under the provisions of subsection (a) of this section, shall pay an annual license tax for the privilege of doing business in this State, in the sum of two hundred dollars (\$200.00) per truck, automobile, or vehicle. The license secured from the State under this section shall be posted in the cab of the truck, automobile, or vehicle.

(f) No county shall levy a tax on any business taxed under the provisions of this section, nor shall any city or town in which any person, firm, corporation, or association taxed hereunder has its principal place of business levy and collect more than one-eighth of the State tax levied under this section; nor shall any tax be levied or collected by any county, city, or town on account of the delivery of the products, beverages, or articles enumerated in subsection (a) or (b) or (c) or (d) of this section when a tax has been paid under any of those subsections. (1939, c. 158, s. 134; 1943, c. 400, s. 2; 1949, c. 782.)

Editor's Note. - The 1943 amendment made changes in the schedules of taxes appearing in subsection (a). It also struck out in the last paragraph of said subsection the words "whether in actual operation or not," and inserted in lieu thereof the words "if in actual operation."

The 1949 amendment inserted the paragraph in subsection (a) immediately following the schedule of license tax fees for

low-pressure equipment.

When Each Distributing Point Liable

for Tax.—Under the prior law, it was held that where the bottling of the beverage was done at a company's home office in this State and, at its expense of delivery and storage, sent to warehouses owned by it for distribution in other cities and towns herein, each of these distributing points was liable for the payment of the license tax, and did not come within the intent and meaning of the exempting provision. Bottling Co. v. Doughton, 196 N. C. 791, 147 S. E. 289 (1929).

105-70. Packing houses.—Every person, firm, or corporation engaged in or operating a meat packing house in this State, and every wholesale dealer in

meat packing-house products who owns, leases, or rents and operates a cold-storage room or warehouse in connection with such wholesale business, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such business in this State, and shall pay for such license the sum of one hundred dollars (\$100.00) for each county in which is located such a packing house or a cold-storage room or warehouse. Every person, firm, or corporation maintaining a cold-storage room or warehouse and distributing such products to other stores owned in whole or in part by the distributor for sale at retail shall be deemed a wholesale dealer or distributor in the meaning of this section. Counties shall not levy any tax on business taxed under this section. (1939, c. 158, s. 135.)

Cross Reference.—See North Carolina Constitution, Art. V, § 3, and note thereto.

§ 105-71. Newspaper contests.—Every person, firm, or corporation that conducts contests and offers a prize, prizes, or other compensation to obtain subscriptions to newspapers, magazines, or other periodicals in this State shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such contests, and shall pay for such license the following tax for each such contest:

Counties, cities and towns may levy a tax not to exceed one-half of that levied by the State under the provisions of this section. (1939, c. 158, s. 136.)

§ 105-72. Persons, firms, or corporations selling certain oils.—(a) Every person, firm, or corporation engaged in the business of selling illuminating or lubricating oil or greases, or benzine, naphtha, gasoline, or other products of like kind shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such business, and shall pay for the same a tax of two dollars and fifty cents (\$2,50).

(b) In addition to the tax herein levied under subsection (a) of this section, such person, firm, or corporation shall pay to the Commissioner of Revenue, on or before the first day of July of each year, an annual additional license tax equal to five per cent (5%) of the total gross sales for the preceding year or part of the year that the business is so conducted or the privilege so exercised, when the total gross sales of such commodities exceed five thousand dollars (\$5,000.00), or pro

rata for a part of the year.

(c) The amount of such total gross sales shall be returned to the Commissioner of Revenue on or before the date specified in subsection (b) of this section by such person, firm, or corporation, verified by the oath of the person making the return, upon such forms and in such detail as may be required by the Commissioner of Poyente.

(d) Counties shall not levy any license tax on the business taxed under this section; but cities or towns in which there is located an agency, station, or warehouse for the distribution or sale of such commodities enumerated in this section may levy the following license tax:

In incorporated towns and cities of less than 10,000 population \$25.00 In cities and towns of 10,000 population and over 50.00

(e) Any person, firm, or corporation subject to this license tax, and doing business in this State without having paid such license tax, shall be fined one thousand dollars (\$1,000.00), and in addition thereto double the tax imposed by this section.

(f) No license or privilege tax, other than the license tax permitted in this section to cities or towns, shall be levied or collected for the privilege of engaging in or doing the business named in this section from any person, firm, or corporation paying the inspection fees and charges provided for under the chapter, Agriculture, except license taxes levied in §§ 105-89 and 105-99. (1939, c. 158, s. 137.)

- § 105-73. Building and loan associations. Every building and loan association, domestic or foreign, operating under a charter granted by authority of the laws of this State or any other state, or the United States, for the purpose of making loans to its members only and of enabling its members to acquire real estate, make improvements thereon, and remove encumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes, shall pay to the Insurance Commissioner, on or before the first day of April of each year, the following annual license tax for the privilege of doing business in the State:
- (a) A tax of thirteen cents (13c) on each one hundred dollars (\$100.00) of liability on actual book value of shares of stock outstanding on the thirty-first day of December of the preceding year, as shown by reports of such association to be made to the Insurance Commissioner. The tax levied herein shall be in addition to the license fee required under § 54-25, and expenses and cost of examination required under § 54-29.

(b) Counties, cities, and towns shall not levy any license tax on the business

taxed in this section. (1939, c. 158, s. 138.)

§ 105-74. Pressing clubs, dry cleaning plants, and hat blockers.— Every person engaging in any of the businesses as herein defined shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such a business, and pay for each such place of business the following tax in each city or town in which he operates any such place of business, except branch offices when located in the same city or town as the parent establishment shall pay one-half the tax levied on the parent establishment:

In cities or towns of less than 1,000 population	\$ 15.00
In cities or towns of 1,000 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	60.00
In cities or towns of 10,000 and less than 20,000 population	90.00
In cities or towns of 20,000 and less than 50,000 population	120.00
In cities or towns of 50,000 population and over	150.00

Provided that pressing clubs, cleaning plants, and/or hat blocking establishments, as same are defined in this section in cities or towns of 5,000 population or over, employing four or less operators or employees, including the owner if he works in said plant, shall be liable for only one-half the amount of license tax

specified above.

Every person, firm, or corporation soliciting cleaning work and/or pressing in any city or town where the actual cleaning and/or pressing is done in a cleaning plant or press shop located outside the city or town wherein said cleaning work and/or pressing is solicited shall procure from the Commissioner of Revenue a State license for the privilege of soliciting in said city or town, and pay for the same an amount equal to the tax which would be paid by said cleaning plant or press shop as if the said cleaning plant or press shop was actually located and being operated in the city or town in which the soliciting is done. This shall not apply to soliciting in cities or towns where there is no cleaning plant, press shop or established agency with fixed place of business, provided that the solicitor shall have paid a State and municipal license tax in this State.

Cities and towns of under 10,000 population may levy a license tax not in excess of \$25.00; cities and towns of 10,000 population and over may levy a license tax not in excess of \$50.00. Counties shall not levy a license tax on the business

taxed under this section.

Definitions: For the purpose of this section, the following definitions shall

apply:

"Dry cleaning, and/or hat blocking, and/or pressing establishments" shall mean any place of business, establishment or vehicle wherein the services of dry

cleaning, wet cleaning as a process incidental to dry cleaning, spotting and/or pressing, finishing and/or reblocking hats, garments, or wearing apparel of any

kind is performed.

"Retail outlet" shall mean any place of business or vehicle where garments are accepted to be dry cleaned and/or pressed, but where the actual dry cleaning and/or pressing is not performed on the premises or vehicles, and where the dry cleaning and/or pressing is performed by a dry cleaning plant or press shop operating under a trade name other than that of the retail outlet.

"Branch office" shall mean an additional establishment where garments are accepted to be dry cleaned and/or pressed, when same is owned and operated by a dry cleaning plant, press shop, or retail outlet and under the same trade name, but where the actual dry cleaning and/or pressing is not performed on the premises.

"Soliciting" as used herein shall mean the acceptance of any article or garment

to be dry cleaned and/or pressed.

"Person" as used herein shall mean any person, firm, corporation, partnership,

or association.

The term "employee" as used herein shall mean any person working either partially or full time for a cleaning plant, press shop, hat blocking establishment, retail outlet or branch office and shall include all drivers, solicitors and route salesmen irrespective of the method of payment they receive for their services, and shall also include independent contractors soliciting under the same style and firm name as the processing plant. It shall also include any member of the firm, association, corporation or partnership who actually performs any work of any nature in the business.

This section shall not apply to any bona fide student of any college or university in this State operating such pressing or dry cleaning business at such college or university during the school term of such college or university. (1939, c. 158, s.

139: 1943, c. 400, s. 2.)

Editor's Note. — The 1943 amendment changed the schedule of license taxes and inserted the proviso immediately following. It also changed the first sentence of the

fifth paragraph and struck out the former last two paragraphs of the section. For comment on amendment, see 21 N. C. Law Rev. 370.

§ 105-75. Barber shops.— Every person, firm, or corporation engaged in the business of conducting a barber shop, beauty shop or parlor, or other shop of like kind shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such business, and shall pay for such license the following tax:

Counties shall not levy a license tax under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 140; 1943, c. 400, s. 2.)

Editor's Note. — The 1943 amendment lowered the tax for each barber, manicurist, etc., from \$5.00 to \$2.50.

§ 105-76. Shoeshine parlors. — Every person, firm, or corporation who or which maintains or operates a place of business wherein is operated a shoeshine parlor, stand, or chair or other device shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such business and shall pay for such license a tax of one dollar (\$1.00) per chair or stool.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of that levied by the State. (1939, c. 158, s. 141.)

§ 105-77. Tobacco warehouses.—Every person, firm, or corporation engaged in the business of operating a warehouse for the sale of leaf tobacco upon commission shall, on or before the first day of June of each year, apply for and obtain from the Commissioner of Revenue a State license for the privilege of operating such warehouse for the next ensuing year, and shall pay for such license the following tax:

For a warehouse in which was sold during the preceding year ending the first

day of June:

Less than 1,000,000 pounds	 \$ 50.00
1,000,000 pounds and less than 2,000,000	 75.00
2,000,000 pounds and less than 3,000,000	 175.00
3,000,000 pounds and less than 4,000,000	 250.00
4,000,000 pounds and less than 5,000,000	 400.00
5,000,000 pounds and less than 6,000,000	 500.00

For all in excess of 6,000,000 pounds, \$500.00 and six cents per thousand

pounds.

(a) If a new warehouse not in operation the previous year, the person, firm, or corporation operating such warehouse may procure a license by payment of the minimum tax provided in the foregoing schedule, and at the close of the season for sales of tobacco in such warehouse shall furnish the Commissioner of Revenue a statement of the number of pounds of tobacco sold in such warehouse for the current year, and shall pay an additional license tax for the current year based on such total volume of sales in accordance with the schedule in this section.

If an old warehouse with new or changed ownership or management, the tax shall be paid according to the schedule in this section, based on the sale during the preceding year, just as if the old ownership or management had continued its op-

eration.

(b) The Commissioner of Agriculture shall certify to the Commissioner of Revenue, on or before the first day of June of each year, the name of each person, firm, or corporation operating a tobacco warehouse in each county in the State. together with the number of pounds of leaf tobacco sold by such person, firm, or corporation in each warehouse for the preceding year, ending on the first day of June of the current year.

(c) The Commissioner of Agriculture shall report to the solicitor of any judicial district in which a tobacco warehouse is located which the owner or operator thereof shall have failed to make a report of the leaf tobacco sold in such warehouse during the preceding year, ending the first day of June of the current year, and such solicitor shall prosecute any such person, firm or corporation under the

provisions of this section.

(d) The tax levied in this section shall be based on official reports of each tobacco warehouse to the State Department of Agriculture showing amount of sales

for each warehouse for the previous year.

(e) The Commissioner of Revenue or his deputies shall have the right, and are hereby authorized, to examine the books and records of any person, firm, or corporation operating such warehouse, for the purpose of verifying the reports made and of ascertaining the number of pounds of leaf tobacco sold during the preceding year, or other years, in such warehouse.

(f) Any person, firm, or corporation who or which violates any of the provisions of this section shall, in addition to all other penalties provided for in this article, be guilty of a misdemeanor, and upon conviction shall be fined not less than five hundred dollars (\$500.00) and/or imprisoned, in the discretion of the

court.

(g) No county shall levy any license tax on the business taxed under this section. Cities and towns may levy a tax not in excess of fifty dollars (\$50.00) for each warehouse. (1939, c. 158, s. 142.)

Cited in State v. Morrison, 210 N. C. 117, 185 S. E. 674 (1936).

§ 105-78. News dealers on trains.—Every person, firm, or corporation engaged in the business of selling books, magazines, papers, fruits, confections, or other articles of merchandise on railroad trains or other common carriers in this State shall apply for and obtain a State license from the Commissioner of Revenue for the privilege of conducting such business, and shall pay for such license the following tax:

Where such person, firm, or corporation operates on railroads or other com-

mon carriers on:

Less than 300 miles\$ 250.00Three hundred and less than 500 miles500.00Five hundred miles or more1,000.00

This section shall not apply to any railroad company engaged in selling such articles to passengers on its train and paying the tax upon the retail sales of merchandise levied in Schedule E, §§ 105-164 to 105-187.

Counties, cities, and towns shall not levy any license tax on the business taxed

under this section. (1939, c. 158, s. 143.)

§ 105-79. Soda fountains, soft drink stands.—Every person, firm, or corporation engaged in the business of operating a soda fountain or soft drink stand shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of conducting such business, and shall pay for such license the following tax:

On soda fountains.

On each carbonated draft arm of each soda fountain, a tax of ten dollars

(\$10.00).

On each stand at which soft drinks are sold, the same not being strictly a soda fountain, and on each place of business where bottled carbonated drinks are sold at retail, the license tax shall be five dollars (\$5.00); provided, that the tax herein levied shall not apply to stands which sell no drinks except milk, milk drinks, products of the dairy, or pure uncarbonated fruit or vegetable juices.

In addition to the license tax levied in this section, the tax shall be paid upon the gross sales at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, upon the retail sales of merchandise, such tax to be paid at the time and in the

manner required for the sales of other merchandise.

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the State. (1939, c. 158, s. 144; 1949, c. 1220, s. 2.)

Editor's Note. — The 1949 amendment added the proviso to the fourth paragraph.

§ 105-80. Dealers in pistols, etc.—Every person, firm, or corporation who is engaged in the business of keeping in stock, selling, and/or offering for sale any of the articles or commodities enumerated in this section, shall apply for and obtain a State license from the Commissioner of Revenue for the privilege of conducting such business, and shall pay for such license the following tax:

(a) If such person, firm, or corporation deals only in metallic cartridges,

the tax shall be five dollars (\$5.00).

(b) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1939, c. 158, s. 145; 1941, c. 50, s. 3.)

Editor's Note. — The 1941 amendment reduced the tax in subsection (a) from ten to five dollars.

§ 105-81: Repealed by Session Laws 1947, c. 501, s. 2.

§ 105-82. Pianos, organs, victrolas, records, radios, accessories.—Every person, firm, or corporation engaged in the business of selling, offering or ordering for sale any of the articles hereinafter enumerated in this section shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of conducting such business, and shall pay for each license the following tax:

For pianos and/or organs, graphophones, victrolas, or other instruments using discs or cylinder records, and/or the sale of records for either or all of these instruments, radios or radio accessories, an annual license tax of ten dollars (\$10.00).

(a) Any person, firm, or corporation applying for and obtaining a license under this section may employ traveling representatives or agents, but such traveling agents or representatives shall obtain from the Commissioner of Revenue a duplicate license of such person, firm, or corporation who or which he represents, and pay for the same a tax of ten dollars (\$10.00).

Each duplicate copy so issued is to contain the name of the agent to whom it is issued, the instrument to be sold, and the same shall not be transferable.

Representatives or agents holding such duplicate copy of such license thereby to sell or offer for sale only the instrument and/or articles authorized to be sold by the person, firm, or corporation holding the original license, and such license shall be good and valid in any county in the State.

(b) Every person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and shall pay a penalty of two hundred and fifty dollars (\$250.00), and in addition thereto double the State license tax

levied in this section for the then current year.

(c) Counties shall not levy any license tax on the business taxed under this section, except that the county in which the agent or representative holding a duplicate copy of the license aforesaid does business may impose a license tax not in excess of five dollars (\$5.00). Cities or towns may levy a license tax on the business taxed under this section not in excess of one-half of that levied by the State. (1939, c. 158, s. 147; 1943, c. 400, s. 2.)

Editor's Note. — The 1943 amendment directed that the words "does business" be inserted in the first sentence of subsection (c).

License for Each Agent.—If the licensee employs more than one salesman he must make out and furnish each salesman with an additional license. This because the license authorizes only the person having it in possession to sell under it. State v. Morrison, 126 N. C. 1123, 36 S. E. 329

(1900).

Sales by Sample—Interstate Commerce.—An act requiring every one, before engaging in selling pianos or organs in the State by sample, list or otherwise, to pay a certain sum for a license, is, in the case of one selling by sample and list, as agent for a manufacturer and dealer located in another state, void, as a regulation of interstate commerce. Ex parte Hough, 69 F. 330 (1895).

§ 105-83. Installment paper dealers.—(a) Every person, firm, or corporation, foreign or domestic, engaged in the business of dealing in, buying, and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is reserved or taken upon personal property located in this State to secure the payment of such obligations, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business or for the purchasing of such obligations in this State, and shall pay for such license an annual tax of one hundred dollars (\$100.00).

(b) In addition to the tax levied in subsection (a) of this section, such person, firm, or corporation shall submit to the Revenue Commissioner quarterly on the first day of January, April, July, and October of each year, upon forms prescribed by the said Commissioner, a full, accurate, and complete statement, verified by the officer, agent, or person making such statement, of the total face value of the installment paper, notes, bonds, contracts, evidences of debt, and/or other

securities described in this section dealt in, bought and/or discounted within the preceding three months and, at the same time, shall pay a tax of one-third of one per cent of the face value of such obligations dealt in, bought and/or discounted

for such period.

(c) If any person, firm, or corporation, foreign or domestic, shall deal in, buy and/or discount any such paper, notes, bonds, contracts, evidences of debt and/or other securities described in this section without applying for and obtaining a license for the privilege of engaging in such business or dealing in such obligations, or shall fail, refuse, or neglect to pay the taxes levied in this section, such obligation shall not be recoverable or the collection thereof enforceable at law or by suit in equity in any of the courts of this State until and when the license taxes prescribed in this section have been paid, together with any and all penalties prescribed in this article for the nonpayment of taxes.

(d) This section shall not apply to corporations organized under the State or

national banking laws.

(e) Counties, cities and towns shall not levy any license tax on the business taxed under this section. (1939, c. 158, s. 148.)

§ 105-84. Tobacco and cigarette retailers and jobbers.—Every person, firm, or corporation engaged in the business of retailing and/or jobbing cigarettes, cigars, chewing tobacco, snuff, or any other tobacco products shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such license the following tax:

Outside of incorporated cities or towns and cities or towns of less than

1,000 population \$5.00 Cities or towns of 1,000 population and over 10.00

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 149.)

§ 105-85. Laundries.—Every person, firm, or corporation engaged in the business of operating a laundry, including wet or damp wash laundries and businesses known as "launderettes," "launderalls" and similar type businesses, where steam, electricity, or other power is used, or who engages in the business of supplying or renting clean linen or towels, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such license the following tax:

In cities or towns of less than 5,000 population	
In cities or towns of 5,000 and less than 10,000 population	
In cities or towns of 10,000 and less than 15,000 population	. 37.50
In cities or towns of 15,000 and less than 20,000 population	. 50.00
In cities or towns of 20,000 and less than 25,000 population	
In cities or towns of 25,000 and less than 30,000 population	
In cities or towns of 30,000 and less than 35,000 population	
In cities or towns of 35,000 and less than 40,000 population	
In cities or towns of 40,000 and less than 45,000 population	
In cities or towns of 45,000 population and above	

Provided, however, that any laundry or other concern herein referred to where the work is performed exclusively by hand or home-size machines only, and where not more than twelve persons are employed, including the owners, the license tax shall be one-third of the amount stipulated in the foregoing schedule.

Every person, firm, or corporation soliciting laundry work or supplying or renting clean linen or towels in any city or town, outside of the city or town wherein said laundry or linen supply or towel supply business is established, shall procure from the Commissioner of Revenue a State license as provided in

the above schedule, and shall pay for such license a tax based according to the population of the city or town, for the privilege of soliciting therein. The additional tax levied in this paragraph shall apply to the soliciting of laundry work or linen supply or towel supply work in any city or town in which there is a laundry, linen supply or towel supply establishment located in the said city or town. The soliciting of business for or by any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linen or towels shall and the same is hereby construed to be engaging in the said business. Any person, firm, or corporation soliciting in said city or town shall procure from the Commissioner of Revenue a State license for the privilege of soliciting in said city or town, said tax to be in the sum equal to the amount which would be paid if the solicitor had an establishment and actually engaged in such business in the said city or town; provided the solicitor has paid a State, county and municipal license in this State.

Counties, cities and towns, respectively, may levy a license tax not in excess of twelve dollars and fifty cents (\$12.50) on any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linens or towels in instances when said work is performed outside the said county or town, or when the linen or towels are supplied by business outside said county or town.

In addition to the annual tax levied in this section, there is hereby levied a tax of one per cent (1%) on the gross receipts of such laundries, as the same are defined in this section, or of such persons, firms or corporations supplying or renting clean linen or towels. The word "laundry" or "laundries" as hereafter used in this section, shall include laundries as defined in this section and persons. firms or corporations renting clean linen or towels. Laundries shall add to the amount charged each customer, except those exempted herein one per cent (1%) of said amount and this added amount shall be paid by each customer as a tax. Provided, the failure of any laundry to add, and collect from its customers one per cent (1%) of the amount charged its customers shall not relieve said laundry from liability for the tax herein imposed. Reports shall be made to the Commissioner of Revenue in such form as he may prescribe within the first ten days of each month, covering all such gross receipts for the previous month, and the tax herein levied shall be paid monthly at the time such reports are made. There shall be excluded from the gross receipts taxed under this section, all sales to the United States government, the State of North Carolina or any agency or subdivision thereof, and sales to charitable or religious organizations or institutions, and hospitals not operated for profit. The one per cent gross receipts tax levied by this paragraph shall not be due or payable by laundries as defined herein on that portion of their business upon which a three per cent sales tax is due and payable.

Failure to file reports herein prescribed and pay the tax shown to be due thereon, within the time prescribed, shall subject such laundries to a penalty of five per centum per month of the amount of tax due from the date the tax is due. If the taxpayer shall refuse to make the reports required under this section, then such reports shall be made by the Commissioner or his duly authorized agents from the best information available, and such reports shall be prima facie correct for the purpose of this article, and the amount of tax due thereby shall be a lien against all the property of the taxpayer until discharged by payments, and if payment not be made within thirty days after demand therefor by the Commissioner or his duly authorized agents, there shall be added not more than one hundred per centum as damages, together with interest at the rate of one per centum per month from the time such tax was due. If such tax be paid within thirty days after notice by the Commissioner, then there shall be added not more than ten per centum as damages per month from the time such tax was due until paid.

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The Commissioner for good cause may extend the time for making any report required under the provisions of this section, and may grant such additional time within which to make such report as he may deem proper, but the time for filing any such report shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such report. If the time for filing a report be extended, interest at the rate of one-half of one per centum per month from the time the report was required to be filed to the time of payment shall be added and paid. (1939, c. 158, s. 150; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1949, c. 392, s. 1.)

Editor's Note.—The 1943 amendment added the last paragraph and rewrote the two paragraphs immediately preceding it.

The 1945 amendment substituted "twelve" for "four" in the first proviso of this sec-

The 1949 amendment, effective June 1, 1949, made this section applicable to launderettes, launderalls and similar type businesses and added the last sentence of the fifth paragraph relating to additional tax of one percent on gross receipts.

§ 105-86. Outdoor advertising.—(a) Every person, firm, or corporation who or which is engaged in the business of outdoor advertising by placing, erecting or maintaining one or more outdoor advertising signs or structures of any nature by means of sign boards, poster boards, or printed bulletins, or other painted matter, or any other outdoor advertising devices, erected upon the grounds, walls or roofs of buildings, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay annually for said license as follows:

And in addition thereto the following license tax for each city, town or other place in which such sign boards, poster boards, painted bulletins and other painted or printed matter or other outdoor advertising devices are maintained, in cities and towns of:

Less than 1,000 population	\$ 5.00
1,000 to 1,999 population	10.00
2,000 to 2,999 population	15.00
3,000 to 3,999 population	20.00
4,000 to 4,999 population	25.00
5,000 to 7,499 population	30.00
7,500 to 14,999 population	50.00
	100.00
25,000 to 49,999 population	150.00
50,000 population and over	200.00
In each county outside of cities and towns	25.00

Provided, that the tax levied in this section shall not apply to regularly licensed motion picture theatres taxed under § 105-37 upon any advertising signs, structures, boards, bulletins, or other devices erected by or placed by the theatre upon property which the theatre has secured by permission of the owner.

Every person, firm, or corporation who or which places, erects or maintains one or more outdoor advertising signs, structures, boards, bulletins or devices as specified in this section shall be deemed to be engaged in the business of outdoor advertising, but when the applicant intends to advertise his own business exclusively by the erection or placement of such outdoor advertising signs, structures, boards, bulletins or devices as specified in this section, he may be licensed to do so upon the payment annually of one dollar (\$1.00) for each sign up to one thousand (1,000) in number, and for one thousand (1,000) or more,

the sum of one thousand dollars (\$1,000.00) for the privilege in lieu of all other taxation as provided in this section, except such further taxation as may be imposed upon him by cities or towns, acting under the power to levy not in excess of one-half of that specified in paragraph two of subsection (a) of this section.

- (b) Every person, firm, or corporation shall show in its application for the State license herein provided for the name of each incorporated city or town within which, and the county within which, it is maintaining or proposes to maintain said sign boards, poster boards, painted bulletins or other painted or printed signs or other outdoor advertising devices within the State of North Carolina. No person, firm, or corporation, licensed under the provisions of this section, shall erect or maintain any outdoor advertising structure, device or display until a permit for the erection of such structure, device or display shall have been obtained from the Commissioner of Revenue. Application for such permit shall be in writing, signed by the applicant or his duly authorized agent, upon blanks furnished by the Commissioner of Revenue, in such form and requiring such information as said Commissioner of Revenue may prescribe. Each application shall have attached thereto the written consent of the owners or duly authorized agent of the property on which structures, device or display is to be erected or maintained, and shall state thereon the beginning and ending dates of such written permission: Provided, the subsection shall not apply to persons, firms, or corporations who or which advertise their or its own business exclusively. and who or which have been licensed therefor pursuant to subsection (a) of this section.
- (c) It shall be unlawful for any person engaged in the business of outdoor advertising to in any manner paint, print, place, post, tack or affix, or cause to be painted, printed, placed, posted, tacked or affixed any sign or other printed or painted advertisement on or to any stone, tree, fence, stump, pole, building or other object which is upon the property of another without first obtaining the written consent of such owner thereof, and any person, firm, or corporation who in any manner paints, prints, places, posts, tacks or affixes, or causes to be painted, printed, posted, tacked or affixed any such advertisement on the property of another except as herein provided shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding fifty dollars (\$50.00), or imprisonment of thirty days: Provided, that the provisions of this section shall not apply to legal notices.
- (d) It shall be unlawful for any person, firm, or corporation to paint, print, place, post, tack or affix any advertising matter within the limits of the right of way of public highways of the State without the permission of the State Highway and Public Works Commission, or upon the streets of the incorporated towns of the State without permission of the governing authorities, and if and when signs of any nature are placed without permission within the highways of the State, or within the streets of incorporated towns, it shall be the duty of the Highway and Public Works Commission or any other administrative body or other governing authorities of the cities and towns of said State to remove said advertising matters therefrom.
- (e) Every person, firm, or corporation owning or maintaining sign boards, poster boards, printed bulletins, or other outdoor advertisements of any nature within this State shall have imprinted on the same the name of such person, firm, or corporation in sufficient size to be plainly visible and permanently affixed thereto.
- (f) A license shall not be granted any person, firm, or corporation having his or its principal place of business outside the State for the display of any advertising of any nature whatsoever, designed or intended for the display of advertising matter, until such person, firm, or corporation shall have furnished and filed with the Commissioner of Revenue a surety bond to the State, approved by him, in such sum as he may fix, not exceeding five thousand dollars (\$5,000.00), con-

ditioned that such licensee shall fulfill all requirements of law, and lawful regulations and orders of said Commissioner of Revenue, relative to the display of advertisements. Such surety bond shall remain in full force and effect as long as any obligations of such licensee to the State shall remain unsatisfied.

(g) No advertising, or other signs specified in this section, shall be erected in the highway right of way so as to obstruct the vision or otherwise to increase the hazards, and all signs upon the highways shall be placed in a manner to be

approved by the said Highway and Public Works Commission.

(h) Any person, firm, or corporation who or which shall refuse to or neglect to comply with the terms and provisions of this section, and who shall fail to pay the tax herein provided for within thirty days after the same shall become due, or who shall paint, print, place, post, tack, affix or display any advertising sign or other matter contrary to the provisions of this section, the Highway and Public Works Commission of the State of North Carolina or other governing body having jurisdiction over the roads and highways of the State, and the governing authorities of cities and towns and its agents and employees, and the board of county commissioners of the various counties of said State and its employees are directed to forthwith seize and remove or cause to be removed all advertisements, signs or other matter displayed contrary to the provisions of this

For the purpose of more effectually carrying into effect the provisions of this section, the Commissioner of Revenue is authorized and directed to prepare and furnish to the Highway and Public Works Commission or other governing body having jurisdiction over the roads and highways of the State a sufficient number of permits to be executed by the owner, lessee or tenant occupying the lands adjacent to the highways of the State, upon which advertisements, signs or other matter displayed contrary to the provisions of this section, in words as follows:

"I, (we), (owner), (lessee), (tenant), authorize and direct the Highway and Public Works Commission of the State of North Carolina to remove from my lands the following signs and advertising matter placed upon my lands unlawfully or without my permission: day of....., 19...

And the said Highway and Public Works Commission or other governing body having jurisdiction over the roads and highways of the State shall forthwith proceed, through its agents, servants and employees, wherever and whenever in its opinion it is necessary to secure the consent to the removal of said signs or other advertising matter from the lands of the owner, lessee or tenant, to secure said consent and to immediately remove said signs or other advertising matter from the lands adjacent to the highways of the State of North Carolina as herein directed.

(i) Every person, firm, or corporation who violates any of the provisions of this section shall be guilty of a misdemeanor, and in addition to the license tax and penaltics provided for herein shall be fined not more than one hundred dollars (\$100.00) for each sign so displayed, or imprisoned, in the discretion of the court.

(j) Counties shall not levy any license tax under this section, but cities and towns may levy a license tax not in excess of one-half of that levied by the State

under paragraph two of subsection (a).

(k) The following signs and announcements are exempted from the provisions of this section: Signs upon property advertising the business conducted thereon; notice or advertisements erected by public authority or required by law in any legal proceedings; any signs containing sixty (60) square feet or less bearing an announcement of any town or city advertising itself: Provided, the same is maintained at public expense.

No tax shall be levied under this section against any person, firm, or corporation erecting, painting, posting or otherwise displaying signs or panels advertising his or its own business containing twelve (12) square feet or less of advertising surface: Provided, that this exemption shall not apply if the signs or panels are displayed in more than five counties. (1939, c. 158, s. 151; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment (m), and changed the designation of struck out former subsections (k) and (l) former subsection (m) to (k). and the last proviso to former subsection

§ 105-87. Motor advertisers.—(a) Every person, firm, or corporation operating over the streets or highways of this State any motor vehicle or other mechanical conveyance equipped with radio, phonograph, or other similar mechanism to produce music, or having any loudspeaker attachment or other sound magnifying device to produce sound effects for advertising purposes, whether advertising his or its own products or those of others, shall be deemed a motor advertiser, shall procure from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business in this State, and shall pay for such license a tax of one hundred dollars (\$100.00) for each vehicle or conveyance so used: Provided, that any such advertiser owning a located place of business in this State and advertising in not more than five counties shall pay one-fourth the tax provided in this section.

(b) Counties may levy a license tax on the business taxed under this section not in excess of one-fourth of that levied by the State, and cities and towns may

levy a tax in excess of ten dollars (\$10.00). (1939 c. 158, s. 151½.)

§ 105-88. Loan agencies or brokers.—Every person, firm, or corporation engaged in the regular business of making loans or lending money, accepting liens on, or contracts of assignments of, salaries or wages, or any part thereof, or other security or evidences of debt for repayment of such loans in installment payment or otherwise, and maintaining in connection with same any office or other located or established place for the conduct, negotiation, or transaction of such business and/or advertising or soliciting such business in any manner whatsoever, shall be deemed a loan agency, and shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting or negotiating such business at each office or place so maintained, and shall pay

for such license a tax of seven hundred fifty dollars (\$750.00).

(a) Nothing in this section shall be construed to apply to banks, industrial banks, trust companies, building and loan associations, co-operative credit unions, nor installment paper dealers defined and taxed under other sections of this article, nor shall it apply to the business of negotiating loans on real estate as described in § 105-41, nor to pawnbrokers lending or advancing money on specific articles of personal property. It shall apply to those persons or concerns operating what are commonly known as loan companies or finance companies and whose business is as hereinbefore described, and those persons, firms, or corporations pursuing the business of lending money and taking as security for the payment of such loan and interest an assignment of wages or an assignment of wages with power of attorney to collect same, or other order or chattel mortgage or bill of sale upon household or kitchen furniture.

(b) At the time of making any such loan, the person, or officer of the firm or corporation making the same, shall give to the borrower in writing in convenient form a statement showing the amount received by the borrower, the amount to be paid back by the borrower, and the time in which said amount

is to be paid, and the rate of interest and discount agreed upon.

(c) Any such person, firm, or corporation failing, refusing, or neglecting to pay the tax herein levied shall be guilty of a misdemeanor, and in addition to double the tax due shall be fined not less than two hundred and fifty dollars (\$250.00) and/or imprisoned, in the discretion of the court. No such loan shall be collectible at law in the courts of this State in any case where the person

making such loan has failed to pay the tax levied herein, and/or otherwise com-

plied with the provisions of this section.

(d) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of one hundred dollars (\$100.00). (1939, c. 158, s. 152.)

Cross Reference.—As to regulation of loan agencies or brokers, see §§ 53-164 to 53-168

§ 105-89. Automobiles, wholesale supply dealers and service stations.—(1) Automotive Service Stations.—Every person, firm, or corporation engaged in the business of servicing, storing, painting, repairing, welding, or upholstering motor vehicles, trailers, semitrailers, or engaged in the business of retail selling and/or delivering of any tires, tools, batteries, electrical equipment, automotive accessories, including radios designed for exclusive use in automobiles, or supplies, motor fuels and/or lubricants, or any of such commodities, in this State, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In rural sections and/or cities or towns of less than 2,500 population	\$10.00
In cities or towns of 2,500 and less than 5,000 population	
In cities or towns of 5,000 and less than 10,000 population	20.00
	30.00
In cities or towns of 20,000 and less than 30,000 population	40.00
In cities or towns of 30,000 or more	50.00

(a) In rural sections where a service station is operated the tax shall be five dollars (\$5.00), unless more than one pump is operated, in which event the tax shall be five dollars (\$5.00) per pump: Provided, that any person, firm, or corporation operating a motor vehicle repair shop or garage in rural sections shall be liable for a minimum annual tax of ten dollars (\$10.00).

(b) The tax levied in this section shall in no case be less than five dollars

(\$5.00) per pump.

(c) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.

(d) The tax imposed in § 105-53 shall not apply to the sale of gasoline to

dealers for resale.

(e) Counties, cities, and towns may levy a license tax upon each place of business located therein under this subsection not in excess of one-fourth of that

levied by the State.

(2) Automotive Equipment and Supply Dealers at Wholesale.—Every person, firm, or corporation engaged in the business of buying, selling, distributing, exchanging, and/or delivering automotive accessories, including radios designed for exclusive use in automobiles, parts, tires, tools, batteries, and/or other automotive equipment or supplies or any of such commodities at wholesale shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on as follows:

25.00
30.00
50.00
75.00
100.00
125.00

Provided, any person, firm, or corporation engaged in the business enumerated in this section and having no located place of business, but selling to retail dealers by use of some form of vehicle, shall obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each vehicle used in carrying on such business fifty dollars (\$50.00).

- (a) For the purpose of this section, the word "wholesale" shall apply to manufacturers, jobbers, and such others who sell to retail dealers, except manufacturers of batteries.
- (b) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.
- (c) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-half of that levied by the State, with the exception that the minimum tax may be as much as ten dollars (\$10.00).
- (d) No person, firm, or corporation paying the wholesalers' tax as levied in subsection two hereof shall be required to pay any additional tax under subsection one of this section for engaging in any of the types of business levied upon in said subsection one.
- (3) Motor Vehicle Dealers.—Every person, firm, or corporation engaged in the business of buying, selling, distributing, servicing, storing and/or exchanging motor vehicles, trailers, semitrailers, tires, tools, batteries, electrical equipment, lubricants, and/or automotive equipment, including radios designed for exclusive use in automobiles, and supplies in this State shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and in cities or towns of less than 1,000 population \$25.00 In cities or towns of 1,000 and less than 2,500 population 50.00 In cities or towns of 2,500 and less than 5,000 population 75.00 In cities or towns of 5,000 and less than 10,000 population 110.00 In cities or towns of 10,000 and less than 20,000 population 140.00 In cities or towns of 20,000 and less than 30,000 population 175.00 In cities or towns of 30,000 or more 200.00

Provided, that persons, firms, or corporations dealing in secondhand or used motor vehicles exclusively shall be liable for the tax as set out in the foregoing schedule unless such business is of a seasonal, temporary, transient, or itinerant nature, in which event the tax shall be three hundred dollars (\$300.00) for each location where such business is carried on.

- (a) Any person, firm, or corporation who or which deals exclusively in motor fuels and lubricants, and has paid the license tax levied under subsection one of this section, shall not be subject to any license tax under subsection two and three of this section.
- (b) No additional license tax under this subsection shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this subsection; nor shall the tax apply to dealers in semitrailers weighing not more than five hundred pounds and carrying not more than one-thousand-pound load, and to be towed by passenger cars, nor to dealers in four-wheel, farm type wagons equipped with rubber tires and designed to be pulled or towed by passenger cars or farm tractors.
- (c) Premises on which used cars are stored or sold when owned or operated by a licensed new car dealer under the same name shall not be deemed as a

separate place of business when conducted within the corporate limits of any

city or town in which such new car business is conducted.

(d) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-fourth of that levied by the State, with the exception that the minimum tax may be as much as twenty dollars (\$20.00): Provided, if such business is of a seasonal, temporary, transient, or itinerant nature, counties, cities, and towns may levy a tax of three hundred dollars (\$300.00) for each location where such business is carried on. (1939, c. 158, s. 153; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1949, c. 392, s. 1.)

Editor's Note.—The 1945 amendment inserted the words "rural sections and/or" in line one of the table of license rates in subsection (1) and added the proviso to

paragraph (a) thereof.

The 1947 amendment renumbered former subsection (3) as (2) and substituted "two" for "three" in paragraph (d) thereof. The amendment rewrote former subsection (2) as new section 105-89.1. It also renumbered former subsection (4) as (3), omitted the former reference in paragraph (a) thereof to subsection (4), struck out former paragraph (c) and redesignated former paragraphs (d) and (e) as (c) and (d), respectively.

The 1949 amendment added to subdivision (b) of subsection (3) the provision relating to dealers in farm type wagons.

Constitutionality of Former Statute.--A provision in a former statute as to the reduction of the license tax if three-fourths of the manufacturer's assets were invested in this State was held constitutional in Bethlehem Motors Corp. v. Flynt, 178 N. C. 399, 100 S. E. 693 (1919). On appeal the statute was held invalid as discriminating against nonresident manufacturers doing business in the State and as discriminating in favor of the products of resident manufacturers by attempting to regulate interstate commerce. Bethlehem Motors Corp. v. Flynt, 256 U.S. 421, 41 S. Ct. 571, 65 L. Ed. 1029 (1921). But this decision of the Supreme Court of the United States was not understood to invalidate the entire statute, since the provision in question was separable from the remainder of the statute. American Exch. Nat. Bank v. Lacy, 188 N. C. 25, 123 S. E. 475 (1924).

Auto trucks were held to come within the designation of "automobiles" as used in a former statute taxing the manufacturers of automobiles. Bethlehem Motors Corp. v. Flynt, 178 N. C. 399, 100 S. E. 693 (1919).

Bank as "Dealer."-Where a dealer in automobiles has sold to the bank, to which he was indebted, his automobiles on hand, for the purpose of securing the debt, under further provisions that he was to sell and collect and hold the proceeds in trust for the purpose stated, and has thereafter left the State, and the bank has assumed to continue the sales and make collection therefor, the bank may not avoid payment of the tax upon the ground that it was not a dealer, etc., in contemplation of the statute, and thus evade the practical efficiency of the statute and reduce it to a nullity. American Exch. Nat. Bank v. Lacv. 188 N. C. 25, 123 S. E. 475 (1924).

Municipal Tax on Operators of Gasoline Pumps.—The provision authorizing counties, cities and towns to levy a license tax on each place of business located therein, not in excess of one-fourth of that levied by the State, does not preclude a city from levying a tax on operators of gasoline pumps located on sidewalks along certain streets between the curb and the property line when such city tax is levied in the nature of a permit in the exercise of regulatory police power. State v. Evans, 205 N.

C. 434, 171 S. E. 640 (1933).

§ 105-89.1. Motorcycle dealers.—Every person, firm, or corporation, foreign or domestic, engaged in the business of buying, selling, distributing, and/or exchanging motorcycles or motorcycle supplies or any of such commodities in this State shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and cities or towns of less than 2,500 pop-	
ulation	\$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00

In cities or towns of 10,000 and less than 20,000 population	\$25.00
In cities or towns of 20,000 and less than 30,000 population	30.00
In cities or towns of 30,000 or more	

(a) A motorcycle dealer paying the license tax under this section may buy, sell, and/or deal in bicycles and bicycle supplies without the payment of an additional license tax.

(b) No additional license tax shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this section.

(c) No motorcycle dealer shall be issued dealer's tags until the license tax

levied under this section has been paid.

(d) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this section, not in excess of one-fourth of that levied by the State, with the exception that the minimum tax may be as much as ten dollars (\$10.00). (1939, c. 158, s. 153; 1947, c. 501, s. 2.)

Editor's Note.—Prior to the 1947 amendment the subject matter of this section appeared as subsection (2) of § 105-89.

§ 105-90. Emigrant and employment agents.—(a) Every person, firm, or corporation, either as agent or principal, engaged in the business of soliciting, hiring, and/or contracting with laborers, male or female, in this State, for employment out of the State shall apply for and obtain from the Commissioner of Revenue a State license for each county for the privilege of engaging in such business, and shall pay for such license a tax of five hundred dollars (\$500.00) for each county in which such business is carried on.

(b) Every person, firm, or corporation who or which engages in the business of securing employment for a person or persons and charging therefor a fee, commission, or other compensation shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license the following annual tax for each

location in which such business is carried on:

In unincorporated communities and in cities and towns of less than 2,500	
population	\$100.00
In cities or towns of 2,500 and less than 5,000 population	200.00
In cities or towns of 5,000 and less than 10,000 population	
In cities or towns of 10,000 or more population	500.00

Provided, that this section shall not apply to any employment agency operated by the federal government, the State, any county or municipality, or whose sole business is procuring employees for work in the production and harvesting of farm crops within the State: And provided further, that under this section the tax on any employment agency whose sole business is the placement of teachers and/or other school employees and which has been approved by the State Superintendent of Public Instruction shall be twenty-five dollars (\$25.00): Provided further, that the tax on employment agencies where the sole business is the placement of domestic servants or unregistered nurses for employment within the State shall be twenty-five dollars (\$25.00).

(c) Any person, firm, or corporation violating the provisions of this section shall be guilty of a misdemeanor and fined, in addition to other penalties, not less than one thousand dollars (\$1,000.00) and/or imprisoned, in the discretion of

the court.

(d) Counties, cities and towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1939, c. 158, s. 154; 1945, c. 635.)

Editor's Note.—The 1945 amendment inserted the words "the business of" near the Constitutionality of Tax on Emigrant

Agent.—A former statute imposing a tax "on every emigrant agent or person engaged in procuring laborers to accept employment in another state" was held constitutional. State v. Hunt, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758 (1901).

An earlier statute taxing the occupation of "emigrant agent" was held invalid for lack of uniformity, State v. Moore, 113 N.

C. 697, 18 S. E. 342 (1893).
Same—Valid Exercise of Taxing Power. -A former statute taxing persons engaged in the business of procuring laborers for employment outside the State was held a valid exercise of the legislative power to tax trades and professions, and was not a police regulation. State v. Roberson, 136 N. C. 587, 48 S. E. 595 (1904). See State v. Hunt, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758 (1901); Carr v. Commissioners, 136 N. C. 125, 48 S. E. 597 (1904); Lane v. Commissioners, 139 N. C. 443, 52 S. E. 140 (1905).

Statute Applies to Agents in Business of Hiring Laborers.—A statute imposing a license tax upon "every emigrant agent or person engaged in procuring laborers for employment out of this State" applies to agents who make it their business to hire laborers in this State to be sent beyond the limits of the State to be employed by others. Carr v. Commissioners, 136 N. C. 125, 48 S. E. 597 (1904).

Employment of Laborers to Work for Hirer.—Laws 1903, c. 247, s. 74, imposing a license tax upon "every emigrant agent or person engaged in procuring laborers for employment out of this State" was held not to apply to a person who came into this State and employed laborers to work for him in another state. Carr v. Commissioners, 136 N. C. 125, 48 S. E. 597 (1904).

An officer of a foreign corporation coming into this State and hiring hands for employment by the corporation in another state is not "engaged in the business of hiring hands," etc., and was held not liable for the tax on emigrant agents, under a former statute. Lane v. Commissioners, 139 N. C. 443, 52 S. E. 140 (1905).

Amount of Tax Not Reviewable. - A tax on the business of procuring laborers for employment outside the State being an exercise of the power of the State to levy taxes, the amount is not reviewable by the courts. State v. Roberson, 136 N. C. 587, 48 S. E. 595 (1904), wherein the court said: "When the Constitution confers upon the legislature the power to levy taxes, the amount of the tax to be levied is committed to that department of the government and not open to review by the judicial department. We may inquire into the question of power, but not as to the manner of its exercise.

§ 105-91. Plumbers, heating contractors, and electricians. — Every person, firm, or corporation engaged in the business of a plumber, installing plumbing fixtures, piping or equipment, steam or gas fitter, or installing hot-air heating systems, or installing electrical equipment, or offering to perform such services, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such license the following tax based on population:

Municipalities of less than two thousand population	\$ 5.00 7.50 10.00 12.50
tion	15.00
Municipalities of thirty thousand and less than forty thousand population	17.50
Municipalities of forty thousand and less than fifty thousand population	20.00
Municipalities of fifty thousand population or more	25.00

Provided, that when an individual required to be licensed under this section employs only one additional person the tax shall be one-half: Provided further, that any person, firm, or corporation engaged exclusively in the businesses enumerated in and licensed under this section shall not be liable for the tax provided in §§ 105-54 to 105-56. All plumbing inspectors in cities or towns shall make a monthly report to the Commissioner of Revenue of all installation or repair permits issued for plumbing or heating.

Counties shall not levy any license tax on the business taxed under this sec-

tion, but cities and towns may levy a license tax not in excess of the base license tax levied by the State. (1939, c. 158, s. 155; 1945, c. 708, s. 2.)

Editor's Note.—The 1945 amendment thereof the words "an individual required struck out in the first proviso the words "a to be licensed under this section."

§ 105-92. Trading stamps.—Every person, firm, or corporation engaged in the business of issuing, selling, and/or delivering trading stamps, checks, receipts, certificates, tokens, or other similar devices to persons, firms, or corporations engaged in trade or business, with the understanding or agreement, expressed or implied, that the same shall be presented or given by the latter to their patrons as a discount, bonus, premium, or as an inducement to secure trade or patronage, and that the person, firm, or corporation selling and/or delivering the same will give to the person presenting or promising the same, money or other thing of value, or any commission or preference in any way on account of the possession or presentation thereof, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such license a tax of two hundred dollars (\$200.00).

(a) This section shall not be construed to apply to a manufacturer or to a merchant who sells the goods, wares, or merchandise of such manufacturer, offering to present to the purchaser or customer a gift of certain value as an

inducement to purchase such goods, wares or merchandise.

(b) Counties, cities, or towns may levy a license tax on the business taxed under this section and not in excess of that levied by the State. (1939, c. 158, s. 156.)

Gift Enterprises. — Dealers in trading stamps do not come within the provision of an ordinance taxing "gift enterprises." Winston v. Beeson, 135 N. C. 271, 47 S. E. 457 (1904).

- § 105-93. Process tax.—(a) In every indictment or criminal proceeding finally disposed of in the superior court, the party convicted or adjudged to pay the cost shall pay a tax of two dollars (\$2.00): Provided, that this tax shall not be levied in cases where the county is required to pay the cost.
- (b) At the time of suing out the summons in a civil action in the superior court or other court of record, or the docketing of an appeal from the lower court in the superior court, the plaintiff or the appellant shall pay a tax of two dollar (\$2.00): Provided, that this tax shall not be demanded of any plaintiff or appellant who has been duly authorized to sue or appeal in forma pauperis; but when in cases brought or in appeals in forma pauperis the costs are taxed against the defendants the tax shall be included in the bill of costs: Provided, that this tax shall not be levied in cases where the county is required to pay the cost and in tax foreclosure suits.
- (c) No county, city, or town, or other municipal corporation shall be required to pay said tax upon the institution of any action brought by it, but whenever such plaintiff shall recover in such action, the said tax shall be included in the bill of costs and collected from the defendant.
- (d) In any case where the party has paid the aforesaid cost in a civil action and shall recover in the final decision of the case, then such cost so paid by him shall be retaxed against the losing party adjudged to pay the cost, plus five per cent (5%) which the clerk of the superior court may retain for his services, and this shall be received by him, whether he is serving on a salary or fee basis, and if on a salary basis, shall be in addition to such salary.
- (e) This section shall not apply to cases in the jurisdiction of magistrates' courts, whether civil or criminal, except upon appeals to the superior court from the judgment of such magistrate, and shall not apply for the docketing in the superior court of a transcript of a judgment rendered in any other court, whether of record or not.

(f) The tax provided for in this section shall be levied and assessed by the clerk of the superior court or other court in all cases described herein; and on the first Monday in January, April, July, and October of each and every year he shall make to the Commissioner of Revenue a sworn statement and report in detail, showing the number of the case on the docket, the name of the plaintiff or appellant in civil action, or the defendant in criminal action, and accompany such report and statement with the amount of such taxes collected, or which should have been collected, by him in the preceding three months. Any clerk of the superior court failing to make the report and pay the amount of tax due under this section within the first fifteen days of the month in which such report is required to be made, shall be liable for a penalty of ten per cent (10%) on the amount of tax that may be due at the time such report should be made. (1939, c. 158, s. 157.)

Where Appeal Is from Clerk to Judge.— Where an appeal is taken from an order of the clerk of the superior court to the judge thereof, the judge has jurisdiction by mandate of § 1-276, and no "docketing" is involved within the meaning of this section, nor is the clerk a "lower court," so the two dollar tax as here provided is inapplicable to the superior court with respect to appeals, and the judge acquires jurisdiction without the payment of the tax. Windsor v. McVay, 206 N. C. 730, 175 S. E. 83 (1934).

- § 105-94: Repealed by Session Laws 1947, c. 501, s. 2.
- § 105-95: Repealed by Session Laws 1947, c. 831, s. 2.
- § 105-96. Marble yards.—Every person, firm, or corporation engaged in the business of manufacturing, erecting, jobbing, selling, or offering for sale monuments, marble tablets, gravestones or articles of like kind, or, if a nonresident, selling and erecting monuments, marble tablets, or gravestones at retail shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license the following tax:

In unincorporated communities and cities or towns of less than 2,000)
population	\$15.00
In cities or towns of 2,000 and less than 5,000 population	25.00
In cities or towns of 5,000 and less than 10,000 population	30.00
In cities or towns of 10,000 and less than 15,000 population	
In cities or towns of 15,000 and less than 20,000 population	
In cities or towns of 20,000 and less than 25,000 population	
In cities or towns of 25,000 population or over	70.00

In addition to the license tax levied in this section, an additional tax shall be paid by the person, firm, or corporation engaged in the business taxed under this section of ten dollars (\$10.00) for each person soliciting or selling.

Counties shall not levy any license tax on the business taxed under this sec-

Counties shall not levy any license tax on the business taxed under this section, but cities and towns in which the principal office or plant of any such business is located may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 160.)

§ 105-97. Manufacturers of ice cream.—(a) Every person, firm, or corporation engaged in the business of manufacturing or distributing ice cream at wholesale shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of doing business in this State and shall pay for each factory or place where manufactured and/or stored for distribution the following base tax: Where the machine or the equipment unit used is of the continuous freezer type the rate of tax shall be one dollar and fifty cents (\$1.50) per gallon capacity based on the rated capacity in gallons per hour according to manufacturer's rating of such freezer or freezers, but in no case shall the tax be less than ten dollars (\$10.00) per annum for any freezer or freezers used;

and where the machine or equipment unit used is not of the continuous freezer type the rate of tax shall be five (\$5.00) dollars per gallon capacity for the freezer or freezers used; but in no case shall the tax be less than ten dollars (\$10.00) per annum for any freezer or freezers used; provided that the Commissioner shall have the right to check the correctness or accuracy of any such manufacturer's rating herein referred to and to levy the tax herein authorized on the basis of such determined capacity; and provided, further that where no standard freezer equipment with manufacturer's capacity rating is used, a tax of fifty dollars (\$50.00) shall apply; and provided, further that the license tax herein shall not apply to any farmer who manufactures and sells only the products of his own cows.

Each truck, automobile or other vehicle coming into this State from another state and selling and/or delivering ice cream on which the tax has not been paid under the provisions of this section shall pay an annual license tax for the privilege of doing business in this State in the sum of one hundred dollars (\$100.00) per truck, automobile or vehicle. The license secured from the State under this section shall be posted in the cab of the truck, automobile or other vehicle.

(b) For the purpose of this section the words "ice cream" shall apply to ice cream, frozen custards, sherbets, water ices, and/or similar frozen products.

(c) Every retail dealer selling at retail ice cream purchased from a manufacturer other than a manufacturer who has paid the tax imposed in subsection (a) of this section or a manufacturer using counter freezer equipment and selling ice cream at retail only shall pay an annual license tax for the privilege of doing business in this State of ten dollars (\$10.00).

(d) Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-fourth

of the above. (1939, c. 158, s. 161; 1945, c. 708, s. 2.)

Editor's Note.—The 1945 amendment rewrote subsection (a) and made subsection (c) applicable to a manufacturer using counter freezer equipment and selling ice cream at retail only.

§ 105-98. Branch or chain stores.—Every person, firm, or corporation engaged in the business of operating or maintaining in this State, under the same general management, supervision, or ownership, two or more stores, or mercantile establishments where goods, wares, and/or merchandise are sold or offered for sale, or from which such goods, wares, and/or merchandise are sold and/or distributed at wholesale or retail, or who or which controls by lease, either as lessor or lessee, or by contract, the manner in which any such store or stores are operated, or the kinds, character, or brands of merchandise which are sold therein, shall be deemed a branch or chain store operator, and shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business of a branch or chain store operator, and shall pay for such license a tax according to the following schedule:

On each and every such store operated in this State in excess of one, sixty-

five dollars (\$65.00).

The term "chain store" as used in this section shall include stores operated under separate charters of incorporation, if there is common ownership of a majority of stock in such separately incorporated companies, and/or if there is similarity of name of such separately incorporated companies, and/or if such separately incorporated companies have the benefit in whole or in part of group purchase of merchandise, or of common management. And in like manner the term "chain store" shall apply to any group of stores where a majority interest is owned by an individual or partnership.

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars (\$50.00) for each chain store located in such city or town. For the purpose of ascertaining the particular unit in each chain of stores not subject to taxa-

tion by the State under this section, and therefore not liable for city license tax, the particular store in which the principal office of the chain in this State is located shall be designated as the unit in the chain not subject to this tax.

In enforcing the provisions of this section, the Commissioner of Revenue may prorate the total amount of tax for a chain to the several units and the amount so prorated may be recovered from each unit in the chain in the same way as

other taxes levied in this article.

This section shall not apply to retail or wholesale dealers in motor vehicles and automotive equipment and supply dealers at wholesale who are not liable for tax hereunder on account of the sale of other merchandise. (1939, c. 158, s. 162; 1945, c. 708, s. 2; 1949, c. 392, s. 1.)

Editor's Note.—The 1945 amendment substituted "privilege" for "purpose" near the end of the first paragraph. The 1949 amendment rewrote the second paragraph setting out the tax schedule.

For brief comment on the 1949 amend-

ment, see 27 N. C. Law Rev. 481.

Constitutionality and Nature of Tax.—Public Laws 1929, c. 345, s. 162, imposing a license tax of fifty dollars for each store operated under the same ownership or management where there was more than one store so operated, was held constitutional and valid. Great A. & P. Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838 (1930).

The statute imposed a license tax for the purpose of raising revenue, and not an ad valorem tax. Nor did the statute seek to regulate chain stores under the police power, and the tax was in accord with the fiscal policy of the State of raising revenue for State purposes by the imposition of taxes on trades, professions, franchises and incomes, and leaving to the counties and municipalities for their support and ad valorem taxes on real and personal property. Great A. & P. Tea Co. v. Maxwell,

199 N. C. 433, 154 S. E. 838 (1930).

Prior Law Invalid.—The prior law, which imposed a license tax of fifty dollars each on stores operated in this State where there were six or more such stores under the same management, but which imposed no such tax on other mercantile establishments doing the same business when there were less than six stores under one management, was held an arbitrary classification, and unconstitutional. Great A. & P. Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 701 (1928).

Corporation Operating Coal and Ice Yards Liable for Tax.—A corporation operating coal and ice yards at established places of business in several cities of the State, one or more yards being operated in each of the cities, and maintaining scales, bins, etc., and a staff composed of a yard foreman and other employees at each establishment, was held liable for the tax imposed by a similar statute, such coal and ice yards being "mercantile establishments" within the meaning of the statute. Atlantic Ice, etc., Co. v. Maxwell, 210 N. C. 723, 188 S. E. 381 (1936).

§ 105-99. Wholesale distributors of motor fuels.—Every person, firm, or corporation engaged in the business of distributing or selling at wholesale any motor fuels in this State shall apply to the Commissioner for an additional annual license to engage in such business, and shall pay for such privilege an additional annual license tax determined and measured by the number of pumps owned or leased by the distributor or wholesaler through which such motor fuels are sold, at retail, according to the following schedule:

For	the	first 100	pumps							 \$ 4.00	per	pump
For	101	additional	pumps	and	not	more	than	200	pumps	 5.00		pump
For	201	additional	pumps	and	not	more	than	300	pumps			pump
For	301	additional	pumps	and	not	more	than	400	pumps			pump
For	401	additional	pumps	and	not	more	than	500	pumps	 8.00	per	pump
For	501	additional	pumps	and	not	more	than	600	pumps	 9.00	per	pump
For	all	over 600	pumps							 10.00	per	pump

Any contract or agreement, oral or written, express or implied by the terms or the effects of which the tax herein imposed shall be passed on directly or indirectly to any person, firm, or corporation not engaged in the business hereby taxed is hereby declared to be against the public policy of this State and null and void, and any person, firm, or corporation negotiating such an agreement,

or receiving the benefits thereof, shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court.

The tax herein imposed shall be in addition to all other taxes imposed by this

chapter or under any other laws.

Counties, cities and towns shall not levy any tax by reason of the additional tax imposed by this section, but this section shall in no way affect the right given to counties, cities, and towns to levy taxes under § 105-89.

The business taxed under this section shall not be taxed under § 105-98.

(1939, c. 158, s. 162½.)

§ 105-100. Patent rights and formulas.—Every person, firm, or corporation engaged in the business of selling or offering for sale any patent right or formula shall apply in advance and obtain from the Commissioner of Revenue a separate State license for each and every county in this State where such patent right or formula is to be sold or offered for sale, and shall pay for each such separate license a tax of ten dollars (\$10.00).

Counties, cities, or towns may levy a license on the business taxed under this section not in excess of the taxes levied by the State. (1939, c. 158, s. 163.)

- § 105-101. Tax on seals affixed by officers.—Whenever the seal of the State, of the State Treasurer, the Secretary of State, or of any other public officer required by law to keep a seal (not including clerks of courts, notaries public, and other county officers) shall be affixed to any paper, the tax to be paid by the party applying for same shall be as follows:

For a scroll, when used in the absence of a seal, the tax shall be on the

scroll, and the same as for the seal.

(a) All officers shall keep a true, full, and accurate account of the number of times any of such seals or scrolls are used, and shall deliver to the Governor of

the State a sworn statement thereof.

- (b) All seals affixed for the use of any county of the State, used on the commissions of officers of the national guard, and any other public officer not having a salary, under the pension law, or under any process of court, or to any commission issued by the Governor to any person in the employ of the State, or to be employed by the State shall be exempt from taxation. (1939, c. 158, s. 166.)
- § 105-102. Junk dealers. Every person, firm, or corporation engaged in the business of buying and/or selling or dealing in what is commonly known as junk, including scrap metals, glass, waste paper, waste burlap, waste cloth, and cordage of every nature, kind and description, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State and shall pay for such license an annual tax for each location where such business is carried on, according to the following schedule:

In unincorporated communities and in cities or towns of less than 2	2,500
population	\$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, that if any person, firm, or corporation shall engage in the business enumerated in this section within a radius of two miles of the corporate limits of any city or town in this State, he or it shall pay a tax based on the population of such city or town according to the schedule above set out: Provided further, that any person, firm or corporation engaged in the business enumerated in this section who does not maintain an established place of business in this State and who buys and/or sells or disposes of junk and other waste materials purchased or collected in this State otherwise than to licensed junk dealers or manufacturers in this State shall be liable for the license tax herein imposed upon the same basis as if such person, firm or corporation maintained a place of business in each county and municipality where such activity is carried on.

Counties, cities and towns may levy a license tax not in excess of one-half of that levied by the State; provided, however, that any person, firm or corporation dealing solely in waste paper shall not be liable for said tax; and provided further, the licenses levied herein shall not apply to persons engaged in the collection of scrap, who maintain no regular place of business, but sell only to licensed dealers or manufacturers in this State; and further that salvage committees operating, under State or federal sponsorship, community scrap yards where personal profit does not accrue, shall not be required to pay license under this section. (1939, c. 158, s. 168; 1943, c. 400, s. 2; 1949, c. 580, ss. 1, 2.)

Editor's Note.—The 1943 amendment added the last proviso.

The 1949 amendment inserted the second proviso following the schedule, and substituted the words "in this State" for the words "using scrap engaged in shipment in interstate commerce" at the end of the second proviso in the last paragraph.

Municipal Tax.—The findings of fact made by the trial court under the agreement of the parties were held to support the court's conclusion of law that plaintiff, although his place of business was located one-half mile outside the limits of defendant municipality, was engaged in the business of buying and selling junk within the municipality, and the judgment holding plaintiff liable for license tax levied by the municipality under authority of this section was affirmed. Weinstein v. Raleigh, 219 N. C. 643, 14 S. E. (2d) 661 (1941). See Weinstein v. Raleigh, 218 N. C. 549, 11 S. E. (2d) 560 (1940), wherein cause was remanded because facts agreed were conflicting

Administrative Provisions of Schedule B.

§ 105-103. Unlawful to operate without license.—When a license tax is required by law, and whenever the General Assembly shall levy a license tax on any business, trade, employment, or profession, or for doing any act, it shall be unlawful for any person, firm, or corporation without a license to engage in such business, trade, employment, profession, or do the act; and when such tax is imposed it shall be lawful to grant a license for the business, trade, employment, or for doing the act; and no person, firm, or corporation shall be allowed the privilege of exercising any business, trade, employment, profession, or the doing of any act taxed in this schedule throughout the State under one license, except under a State-wide license. (1939, c. 158, s. 181.)

§ 105-104. Manner of obtaining license from the Commissioner of Revenue. — (a) Every person, firm, or corporation desiring to obtain a State license for the privilege of engaging in any business, trade, employment, profession, or of the doing of any act for which a State license is required, shall, unless otherwise provided by law, make application therefor in writing to the Commissioner of Revenue, in which shall be stated the county, city, or town and the definite place therein where the business, trade, employment, or profession is to be exercised; the name and resident address of the applicant, whether the applicant is an individual, firm, or corporation; the nature of the business, trade, employment, or profession; number of years applicant has prosecuted such business, trade, employment, or profession in this State, and such other information

as may be required by the Commissioner of Revenue. The application shall be

accompanied by the license tax prescribed in this article.

- (b) Upon receipt of the application for a State license with the tax prescribed by this article, the Commissioner of Revenue, if satisfied of its correctness, shall issue a State license to the applicant to engage in the business, trade, employment, or profession in the name of and at the place set out in the application. No license issued by the Commissioner of Revenue shall be valid or have any legal effect unless and until the tax prescribed by law has been paid, and the fact of such shall appear on the face of the license. (1939, c. 158, s. 182.)
- § 105-105. Persons, firms, and corporations engaged in more than one business to pay tax on each.—Where any person, firm, or corporation is engaged in more than one business, trade, employment, or profession which is made under the provisions of this article subject to State license taxes, such persons, firms, or corporations shall pay the license tax prescribed in this article for each separate business, trade, employment, or profession. (1939, c. 158, s. 183.)
- § 105-106. Effect of change in name of firm.—No change in the name of a firm, partnership, or corporation, nor the taking in of a new partner, nor the withdrawal of one or more of the firm, shall be considered as commencing business; but if any one or more of the partners remain in the firm, or if there is change in ownership of less than a majority of the stock, if a corporation, the business shall be regarded as continuing. (1939, c. 158, s. 184.)
- § 105-107. License may be changed when place of business is changed.—When a person, firm, or corporation has obtained a State license to engage in any business, trade, employment, or profession at any definite location in a county, and desires to remove to another location in the same county, the Commissioner of Revenue may, upon proper application, grant such person, firm, or corporation permission to make such move, and may endorse upon the State license his approval of change in location. (1939, c. 158, s. 185.)
- § 105-108. Property used in a licensed business not exempt from taxation. A State license, issued under any of the provisions of this article shall not be construed to exempt from other forms of taxation the property employed in such licensed business, trade, employment, or profession. (1939, c. 158, s. 186.)
- \S 105-109. Engaging in business without a license.— (a) All State license taxes under this article or schedule, unless otherwise provided for, shall be due and payable annually on or before the first day of June of each year, or at the date of engaging in such business, trade, employment and/or profession, or doing the act.
- (b) If any person, firm, or corporation shall continue the business, trade, employment, or profession, or to do the act, after the expiration of a license previously issued, without obtaining a new license, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, but the fine shall not be less than twenty per cent (20%) of the tax in addition to the tax and the costs; and if such failure to apply for and obtain a new license be continued, such person, firm, or corporation shall pay additional tax of five per centum (5%) of the amount of the State license tax which was due and payable on the first day of June of the current year, in addition to the State license tax imposed by this article, for each and every thirty days that such State license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax, and shall become a part of the State license tax. The penalties for delayed payment hereinbefore provided shall not impair the obligation to procure a license in advance or modify any of the pains and penalties for failure to do so.

The provisions of this section shall apply to taxes levied by the counties of the State under authority of this article in the same manner and to the same extent as they apply to taxes levied by the State.

- (c) If any person, firm, or corporation shall commence to exercise any privilege or to promote any business, trade, employment, or profession, or to do any act requiring a State license under this article without such State license, he or it shall be guilty of a misdemeanor, and shall be fined and/or imprisoned in the discretion of the court; and if such failure, neglect, or refusal to apply for and obtain such State license be continued, such person, firm, or corporation shall pay an additional tax of five per centum (5%) of the amount of such State license tax which was due and payable at the commencement of the business, trade, employment or profession, or doing the act, in addition to the State license tax imposed by this article, for each and every thirty (30) days that such State license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax and shall become a part of the State license tax.
- (d) If any person, firm, or corporation shall fail, refuse, or neglect to make immediate payment of any taxes due and payable under this article, additional taxes, and/or any penalties imposed pursuant thereto, upon demand, the Commissioner of Revenue shall certify the same to the sheriff of the county in which such delinquent lives or has his place of business, and such sheriff shall have the power and shall levy upon any personal or real property owned by such delinquent person, firm, or corporation, and sell the same for the payment of the said tax or taxes, penalty and costs, in the same manner as provided by law for the levy and sale of property for the collection of other taxes; and if sufficient property is not found, the said sheriff or deputy commissioner shall swear out a warrant before some justice of the peace or recorder in the county for the violation of the provisions of this article and as provided in this article. (1939, c. 158, s. 187.)
- § 105-110. Each day's continuance in business without a State license a separate offense.—Each and every day that any person, firm, or corporation shall continue to exercise or engage in any business, trade, employment, or profession, or do any act in violation of the provisions of this article, shall be and constitute a distinct and a separate offense. (1939, c. 158, s. 188.)
- § 105-111. Duties of Commissioner of Revenue.—(a) Except where otherwise provided, the Commissioner of Revenue shall be the duly authorized agent of this State for the issuing of all State licenses and the collection of all license taxes under this article, and it shall be his duty and the duty of his deputies to make diligent inquiry to ascertain whether all persons, firms, or corporations in the various counties of the State who are taxable under the provisions of this article have applied for the State license and paid the tax thereon levied.

(b) The Commissioner of Revenue shall continually keep in his possession a sufficient supply of blank State license certificates, with corresponding sheets and duplicates consecutively numbered; shall stamp across each State license certificate that is to be good and valid in each and every county of the State the words "State-wide license," and shall stamp or imprint on each and every license certificates that is to be good and valid in each and every license certificates with the state of the

cate the words "issued by the Commissioner of Revenue."

(c) Neither the Commissioner of Revenue nor any of his deputies shall issue any duplicate license unless expressly authorized to do so by a provision of this article or schedule, and unless the original license is lost or has become so mutilated as to be illegible, and in such cases the Commissioner of Revenue is authorized to issue a duplicate certificate for which the tax is paid, and shall stamp upon its face "duplicate." (1939, c. 158, s. 189.)

§ 105-112. License to be procured before beginning business.—(a) Every person, firm, or corporation engaging in any business, trade, and/or profession, or doing any act for which a State license is required and a tax is to be

paid under the provisions of this article or schedule, shall, annually in advance, on or before the first day of June of each year, or before engaging in such business, trade, and/or profession, or doing the act, apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, trade, and/or profession, or doing such act, and shall pay the tax levied therefor.

(b) Licenses shall be kept posted where business is carried on. No person, firm, or corporation shall engage in any business, trade, and/or profession, or do the act for which a State license is required in this article or schedule, without having such State license posted conspicuously at the place where such business, trade, and/or profession is carried on; and if the business, trade, and/or profession is such that license cannot be so posted, then the itinerant licensee shall have such license required by this article or schedule in his actual possession at the time of carrying on such business, trade, and/or profession, or doing the act named in this article or schedule, or a duplicate thereof.

(c) Any person, firm, or corporation failing, neglecting, or refusing to have the State license required under this article or schedule posted conspicuously at the place of business for which the license was obtained, or to have the same or a duplicate thereof in actual possession if an itinerant, shall pay an additional tax of twenty-five dollars (\$25.00) for each and every separate offense, and each day's failure, neglect, or refusal shall constitute a separate offense. (1939, c. 158, s.

190.)

§ 105-113. Sheriff and city clerk to report.—The sheriff of each county and the clerk of the board of aldermen of each city or town in the State shall, on or before the fifteenth day of June of each year, make a report to the Commissioner of Revenue, containing the names and the business, trade, and/or the profession of every person, firm, or corporation in his county or city who or which is required to apply for and obtain a State license under the provisions of this article or schedule, and upon such forms as shall be provided and in such detail as may be required by the Commissioner of Revenue. (1939, c. 158, s. 191.)

§ 105-113.1: Deleted.

Editor's Note.—This section, which related to privilege taxes payable in advance and provided for the reduction of taxes levied under certain sections, was derived

from Session Laws 1943, c. 400, s. 2, and was amended by Session Laws 1945, c. 708, s. 2. As the section expired by limitation on June 1, 1947, it has been deleted.

ARTICLE 3.

Schedule C. Franchise Tax.

§ 105-114. Nature of taxes; definitions.—The taxes levied in this article upon persons and partnerships are for the privilege of engaging in business or doing the act named. The taxes levied in this article upon corporations are privilege or excise taxes levied upon: (1) Corporations organized under the laws of this State for the existence of the corporate rights and privileges granted by their charters, and the enjoyment, under the protection of the laws of this State, of the powers, rights, privileges and immunities derived from the State by the form of such existence; and (2) corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which such corporations receive from the government and laws of this State in doing business in this State.

The term "corporation" as used in this article shall, unless the context clearly requires another interpretation, mean and include not only corporations but also associations or joint-stock companies and every other form of organization for pecuniary gain, having capital stock represented by shares, whether with or without par value, and having privileges not possessed by individuals or partnerships;

and whether organized under, or without, statutory authority.

When the term "doing business" is used in this article, it shall mean and in-

clude each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization whether the form of existence be corporate, associate, joint-

stock company or common-law trust.

If the corporation is organized under the laws of this State, the payment of the taxes levied by this article shall be a condition precedent to the right to continue in such form of organization; and if the corporation is not organized under the laws of this State, payment of said taxes shall be a condition precedent to the right to continue to engage in doing business in this State. The taxes levied in this article or schedule shall be for the fiscal year of the State in which said taxes become due. (1939, c. 158, s. 201; 1943, c. 400, s. 3; 1945, c. 708, s. 3.)

Editor's Note.—The 1943 amendment struck out former provisions relating to tax liens. The 1945 amendment rewrote this section.

Franchise Tax Not Ordinarily Included in Term "Privilege Tax."-While the term "privilege tax" includes franchise taxes as well as license taxes, a franchise is a special kind of privilege constituting a property right, which is ordinarily transferable and exclusive, and involves the use of public facilities. The word "privilege" is too broad, per se, as a classification for taxation, but is usually particularized into licenses and franchises in classifying businesses for taxation, and as used in our taxing statutes, the term "privilege tax" does not ordinarily include franchise taxes. Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948).

Tax Measured by Amount of Business Transacted.—Whenever a tax is imposed upon a corporation directly by the legislature and is not assessed by assessors, and the amount depends on the amount of business transacted by the corporation, and the extent to which it has exercised the privileges granted in its charter, without reference to the value of its property or the nature of the investments made of it, it is a franchise tax. Worth v. Petersburg R. Co., 89 N. C. 301 (1883).

Uniformity Required.—The rule of uniformity laid down in N. C. Const., Art. V, § 3, was intended to apply to taxes on franchises. Worth v. Petersburg R. Co., 89

N. C. 301 (1883).

Legislature May Make Tax by State Exclusive. — The General Assembly may require a corporation to pay a license tax for the privilege of carrying on its business, and forbid counties or other municipalities to exact any other license tax or fee. Loan Ass'n v. Commissioners, 115 N. C. 410, 20 S. E. 526 (1894).

Cited in Standard Fertilizer Co. v. Gill, 225 N. C. 426, 35 S. E. (2d) 275 (1945).

§ 105-115. Franchise or privilege tax on railroads.—Every person, firm, or corporation, domestic or foreign, owning and/or operating a railroad in this State shall, in addition to all other taxes levied and assessed in the State, pay annually to the Commissioner of Revenue a franchise, license, or privilege tax for the privilege of engaging in such railroad business within the State of North Carolina, as follows:

(a) Such person, firm or corporation shall during the month of June each year furnish to the Commissioner of Revenue a copy of the report and statement required to be made to the State Board of Assessment by the Machinery Act in effect at the time such report is due, and such other and further information as the

Commissioner of Revenue may require.

(b) The value upon which the tax herein levied shall be assessed by the Commissioner of Revenue and the measure of the extent to which every such railroad company is carrying on intrastate commerce within the State of North Carolina shall be the value of the total property, tangible and intangible, in this State, for each such railroad company, as assessed for ad valorem taxation during the calendar year in which such report is due.

(c) The franchise or privilege tax which every such railroad company shall pay for the privilege of carrying on or engaging in intrastate commerce within this State shall be seventy-five one-hundredths of one per cent (75/100%) of the value ascertained as above by the Commissioner of Revenue, and tax shall be due

, and payable within thirty days after date of notice of such tax.

(d) If any such person, firm, or corporation shall fail, neglect, or refuse to

make and deliver the report or statements provided for in this section, the Commissioner of Revenue shall estimate, from the reports and record on file with the State Board of Assessment, the value upon which the amount of tax due by such company under this section shall be computed, and shall assess the franchise or privilege tax upon such estimate, and shall collect the same, together with such

penalties herein imposed for failure to make the report and statement.

(e) It is the intention of this section to levy upon railroad companies a license, franchise, or privilege tax for the privilege of engaging in intrastate commerce carried on wholly within this State, and not a part of interstate commerce; that the tax provided for in this section is not intended to be a tax for the privilege of engaging in interstate commerce, nor is it intended to be a tax on the business of interstate commerce, nor is it intended to be a tax having any relation to the interstate or foreign business or commerce in which any such railroad company may be engaged in addition to its business in this State.

(f) No county, city or town shall levy a license, franchise, or privilege tax on

the business taxed under this section.

(g) In determining the franchise tax of any railroad company now leasing its properties, there shall be excluded from the value of its properties all railroad properties being operated by any lessee company upon which valuation the franchise tax is required to be paid by the operating company. (1939, c. 158, s. 202; 1945, c. 708, s. 3.)

Cross Reference. — As to allowance of tax paid on bank deposits under § 105-199 as credit on tax payable under this section added subsection (g).

§ 105-116. Franchise or privilege tax on electric light, power, street railway, street bus, gas, water, sewerage, and other similar public service companies not otherwise taxed. — (1) Every person, firm, or corporation, domestic or foreign, other than municipal corporations, engaged in the business of furnishing electricity, electric lights, current, power or gas, or owning and/or operating a water or public sewerage system, or owning and/or operating a street railway, street bus or similar street transportation system for the transportation of freight or passengers for hire, shall, within thirty days after the first day of January, April, July and October of each year, make and deliver to the Commissioner of Revenue, upon such forms and blanks as required by him, a report verified by the oath of the officer or authorized agent making such report and statement, containing the following information:

(a) The total gross receipts for the three months ending the last day of the month immediately preceding such return from such business within and without this State.

this State.

(b) The total gross receipts for the same period from such business within this State.

(c) The total gross receipts from the commodities or services described in this section sold to any other person, firm, or corporation engaged in selling such commodities or services to the public, and actually sold by such vendee to the public for consumption and tax paid to this State by the vendee, together with the name of such vendee, with the amount sold and the price received therefor.

(d) The total amount and price paid for such commodities or services purchased from others engaged in the above-named business in this State, and the

name or names of the vendor.

(2) From the total gross receipts within this State there shall be deducted the gross receipts reported in subsection (1) (c) of this section: Provided, that this deduction shall not be allowed where the sale of such commodities was made to any person, firm, or corporation or municipality which is exempted by law from the payment of the tax herein imposed upon such commodities when sold or used by it.

(3) On every such person, firm or corporation there is levied an annual fran-

chise or privilege tax of six per cent (6%), payable quarterly, of the total gross receipts derived from such business within this State, after the deductions allowed as herein provided for, which said tax shall be for the privilege of carrying on or engaging in the business named in this State, and shall be paid to the Commissioner of Revenue at the time of filing the report herein provided for: Provided, the tax upon privately owned water companies shall be four per cent (4%) of the total gross receipts derived from such business within this State: Provided further, the tax on gas companies shall be at the rate of four per cent (4%) upon the first twenty-five thousand dollars (\$25,000.00) of the total gross receipts, and the tax on all gross receipts in excess of twenty-five thousand dollars (\$25,000.00) shall be at the rate of six per cent (6%).

(4) Any person, firm, or corporation failing to file report and pay tax found to be due in accordance with the provisions of this section at the time herein provided for shall, in addition to all other penalties prescribed by this article, pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall in no case be less than two dollars (\$2.00), and shall be added to the tax, together with interest accrued, and shall become an integral part of the tax.

(5) The report herein required of gross receipts within and without the State, shall include the total gross receipts for the period stated of all properties owned and operated by the reporting person, firm, or corporation on the first day of each calendar quarter year, whether operated by it for the previous annual period, or whether intermediately acquired by purchase or lease, it being the intent and purpose of this section to measure the amount of privilege or franchise tax in each calendar quarter year with reference to the gross receipts of the property operated for the previous calendar quarter year and to fix liability for the payment of the tax on the owner, operator, or lessor on the first day of January, April, July and October of each year.

(6) Companies taxed under this section shall not be required to pay the franchise tax imposed by \S 105-122 or \S 105-123 unless the tax levied by \S 105-122 or \S 105-123 exceeds the tax levied in this section, and no county shall impose a franchise, license or privilege tax upon the business taxed under this section.

(7) The Commissioner of Revenue shall ascertain the total gross receipts derived from the sale within any municipality of the commodities or services described in this section, except water and sewerage services, and out of the tax of six per cent (6%) of gross receipts levied by this section, an amount equal to a tax of 34 of 1% of the gross receipts from sales within any municipality shall be distributed to such municipality: Provided, that out of the tax of four per cent (4%) of the first \$25,000.00 of gross receipts of gas companies an amount equal to a tax of 34 of 1% of the gross receipts from sales within any municipality, and out of the tax of six per cent (6%) of gross receipts of gas companies in excess of \$25,000.00 an amount equal to a tax of 34 of 1% of the gross receipts from sales within any municipality, shall be distributed to such municipality. If the gross receipts of any gas company from sales within and without any municipality exceed \$25,000.00, receipts from sales without the municipality shall be allocated to the first \$25,000.00 of total gross receipts.

Not later than fifteen days after the date on which each quarterly payment of taxes is due under this section, the Commissioner of Revenue shall report to the State Board of Assessment the amount collected under this section on account of receipts from the sale within each municipality of the commodities or services, other than water and sewerage services, described in this section. The State Board of Assessment shall examine such reports and, if found to be correct, shall certify a copy of the same to the State Auditor and State Treasurer. Upon certification by the State Board of Assessment, as herein provided, it shall be the duty of the State Auditor to issue warrant on the State Treasurer to the treasurer, or

other officer authorized to receive public funds, of each municipality in the amount

to be distributed to each such municipality as herein provided.

So long as there is a distribution to municipalities of the amount herein provided from the tax imposed by this section, no municipality shall impose or collect any greater franchise, privilege or license taxes, in the aggregate, on the businesses taxed under this section, than was imposed and collected on or before January 1, 1947. If any municipality shall have collected any privilege, license or franchise tax between January 1, 1947, and April 1, 1949, in excess of the tax collected by it prior to January 1, 1947, then upon distribution of the taxes imposed by this section to municipalities, the amount distributable to any municipality shall be credited with such excess payment. (1939, c. 158, s. 203; 1949, c. 392, s. 2.)

Editor's Note. — The 1949 amendment rewrote subsection (6) and added subsection (7). For brief comment on the amendment, see 27 N. C. Law Rev. 482.

For history of subsection (6) prior to the 1949 amendment, see Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287

(1948).

A former statute of similar import, but differently worded, was held not to apply to the operation of buses for hire within a city, even though operated on definite routes, unless used in connection with or in substitution for a street railway. Safe Bus

v. Maxwell, 214 N. C. 12, 197 S. E. 567 (1938).

"Privilege or License Tax" Not Including Franchise Taxes.—The term "privilege or license tax," as used in subsection (6) prior to the 1949 amendment, did not include franchise taxes, it being apparent that the legislature would have used the term "franchise" eo nomine if it had intended to include franchise taxes within the limitation upon taxes to be imposed by cities or towns. Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948).

§ 105-117. Franchise or privilege tax on Pullman, sleeping, chair, and dining cars.—(1) Every person, firm, or corporation, domestic or foreign, engaged in the business of operating in this State any Pullman, sleeping, chair, dining or other similar cars, where an extra charge is made for the use or occupancy of same, shall annually, on or before the first day of August, make and deliver to the Commissioner of Revenue, upon such forms, blanks, and in such manner as may be required by him, a full, accurate, and true report and statement, verified by oath of the officer or authorized agent making such report, of the total gross receipts of such person, firm, or corporation from such business wholly within this State during the year ending the thirtieth day of June of the current year.

(2) Such person, firm, or corporation shall pay an annual privilege, license, or franchise tax of ten per cent (10%) of the total gross receipts derived from such business wholly within this State; which said tax shall be paid for the privilege of carrying on or engaging in the business named in this State, and shall be paid to the Commissioner of Revenue at the time of filing the report and statements

herein provided for.

(3) No county, city or town shall impose any franchise or privilege tax on the business taxed under this section. (1939, c. 158, s. 204.)

Cited in Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948).

§ 105-118. Franchise or privilege tax on express companies.—(1) Every person, firm, or corporation, domestic or foreign, engaged in this State in the business of an express company as defined in this chapter, shall, in addition to a copy of the report required by the Machinery Act then in effect, annually, on or before the first day of August, make and deliver to the Commissioner of Revenue a report and statement, verified by the oath of the officer or authorized agent making such report or statement, containing the following information as of the thirtieth day of June of the current year:

(a) The average amount of invested capital employed within and without the State in such business during the year ending the thirtieth day of June of the cur-

rent year.

- (b) The total net income earned on such invested capital from such business during the year ending the thirtieth day of June of the current year.
- (c) The total number of miles of railroad lines or other common carriers over which such express companies operate in this State during the year ending the thirtieth day of June of the current year.
- (2) Every such person, firm, or corporation, domestic or foreign, engaged in such express business within this State shall pay to the Commissioner of Revenue, at the time of filing the report required in this section, the following annual franchise or privilege tax for the privilege of engaging in such express business within this State:

Where the net income of the average capital invested during the year ending the thirtieth day of June of the current year is six per cent (6%) or less, fifteen dollars (\$15.00) per mile of railroad lines over which operated.

More than six per cent (6%) and less than eight per cent (8%), twenty-one

dollars (\$21.00) per mile of railroad lines over which operated.

Eight per cent (8%) and over, twenty-five dollars (\$25.00) per mile of rail-road lines over which operated.

- (3) Every such person, firm, or corporation, domestic or foreign, who or which engages in such business without having had previous receipts upon which to levy the franchise or privilege tax, shall report to the Commissioner at the time of beginning business in this State and pay for such privilege of engaging in business in this State a tax of seven dollars and fifty cents (\$7.50) per mile of the railroad lines over which operated or proposed to operate.
- (4) Counties shall not levy a franchise, privilege or license tax on the business taxed under this section; and municipalities may levy an annual franchise, privilege, or license tax on such express companies for the privilege of doing business within the municipal limits as follows:

Municipalities of less than 500 population	. \$ 5.00
Municipalities of 500 and less than 1,000 population	. 10.00
Municipalities of 1,000 and less than 5,000 population	. 20.00
Municipalities of 5,000 and less than 10,000 population	. 30.00
Municipalities of 10,000 and less than 20,000 population	. 50.00
Municipalities of 20,000 and over	75.00
(1939, c. 158, s. 205.)	

Constitutionality.—A tax upon express companies of \$15.00 per mile of track over which they operate in this State, when the net income is six per cent or less, levied under the provisions of the former statute, was held valid under the provisions of our State Constitution, Art. V, § 3. Railway Express Agency v. Maxwell, 199 N. C. 637, 155 S. E. 553 (1930).

Where a tax levied on an express company under the provisions of the statute is \$15.00 per mile of track over which it operates in this State, amounting to slightly in excess of 12 per cent of its gross revenue exclusively derived from intrastate business, not taking into account large gross receipts from interstate business, it will not be held as a matter of law that the tax is unconstitutional as being confiscatory. Railway Express Agency v. Maxwell, 199 N. C. 637, 155 S. E. 553 (1930).

Question of Earnings within and without

State Immaterial.-Where a statute imposes a tax upon express companies based upon the mileage of track in this State over which they operate, levying a tax of \$15.00 per mile when the net income of the company is six per cent or less, \$18.00 when the net income does not exceed eight per cent, and \$21.00 per mile when the net income exceeds eight per cent, and the State levies the minimum tax on an express company, which sues to recover the amount so paid, the question of the ratio of the company's net earnings in this and other states, and the amount of the net income are immaterial to the conclusion as to whether the tax is valid, the tax levied being constant regardless of income or the ratio between interstate and intrastate business, and the validity of the higher rate of taxes levied by the statute is not directly presented for decision. Railway Express Agency v. Maxwell, 199 N. C. 637, 155 S. E. 553 (1930).

§ 105-119. Franchise or privilege tax on telegraph companies. —

(1) Every person, firm or corporation, domestic or foreign, engaged in operating the apparatus necessary for communication by telegraph between points within this State, shall annually, on or before the first day of August, make and deliver to the Commissioner of Revenue, upon such forms and in such manner as required by him, a report verified by the oath of the officer or authorized agent making such report and statement, containing the following information:

(a) The total gross receipts from business within and without this State for

the entire calendar year next preceding due date on such return.

(b) The total gross receipts for the same period from business within this State. (2) On every such person, firm or corporation there is hereby levied an annual franchise or privilege tax of six per cent (6%) of the total gross receipts derived from business within this State. Such gross receipts shall include all charges for services, all rentals, fees, and all other similar charges from business which both originates and terminates in the State of North Carolina, whether such business in the course of transmission goes outside this State or not. The tax herein levied shall be for the privilege of carrying on or engaging in the business named in this State, and shall be paid to the Commissioner of Revenue at the time of filing the report herein provided for: Provided, that the tax on the first one thousand dollars (\$1,000.00) of gross receipts of any such telegraph company shall be at the rate of four per cent (4%), and all gross receipts in excess of said first one thousand dollars (\$1,000.00) shall be taxed at the rate of six per cent (6%).

(3) The report herein required shall include the total gross receipts for the period stated of all properties owned, leased, controlled and/or over which operated

by such person, firm or corporation in this State.

(4) Any person, firm or corporation failing to file report and pay tax found to be due in accordance with the provisions of this section at the time herein provided for shall, in addition to all other penalties prescribed in this article, pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall in no case be less than two dollars (\$2.00), and shall be added to the tax, together with interest accrued, and shall become an integral part of the tax.

(5) (a) Nothing in this section shall be construed to authorize the imposition

of any tax upon interstate commerce.

(b) Counties shall not levy a franchise, privilege, or license tax on the business taxable under this section, and municipalities may levy the following license tax:

	*	0	
Less than 5,000 population			\$10.00
5,000 and less than 10,000 population			15.00
10,000 and less than 20,000 population	• • • • • • • • • • • • • • • • • • • •		20.00
20,000 population and over			50.00

(1939, c. 158, s. 206.)

Cited in Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948).

§ 105-120. Franchise or privilege tax on telephone companies.—
(1) Every person, firm or corporation, domestic or foreign, owning and/or operating a telephone business for the transmission of messages and/or conversations to, from, through, in or across this State, shall, within thirty days after the first day of January, April, July and October of each year, make and deliver to the Commissioner of Revenue a quarterly return, verified by the oath of the officer or authorized agent making such return, showing the total amount of gross receipts of such telephone company for the three months ending the last day of the month immediately preceding such return, and pay, at the time of making such return, the franchise, license or privilege tax herein imposed.

(2) An annual franchise or privilege tax of six per cent (6%), pavable quar-

terly, on the gross receipts of such telephone company, is herein imposed for the privilege of engaging in such business within this State. Such gross receipts shall include all rentals, other similar charges, and all tolls received from business which both originates and terminates in the State of North Carolina, whether such business in the course of transmission goes outside of this State or not: Provided, where any city or town in the State has heretofore sold at public auction to the highest bidder the right, license and/or privilege of engaging in such business in such city or town, based upon a percentage of gross revenue of such telephone company, and is now collecting and receiving therefor a revenue tax not exceeding one per cent of such revenues, the amount so paid by such operating company, upon being certified by the treasurer of such municipality to the Commissioner of Revenue, shall be from time to time credited by the Commissioner of Revenue to such telephone company upon the tax imposed by the State under this section of this chapter.

(3) Any such person, firm or corporation, domestic or foreign, who or which fails, neglects, or refuses to make the return, and/or pay the tax at the time provided for in this section, shall pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall not be less than two dollars (\$2.00) in any case, and shall be added to the tax, together with the

interest accrued, and shall become an integral part of the tax.

(4) The Commissioner of Revenue shall ascertain the total gross receipts derived from local business conducted within each municipality in this State by persons, firms or corporations taxed under this section, and out of the tax levied by this section, an amount equal to a tax of ¾ of 1% of the gross receipts from local business conducted within any municipality shall be distributed to such municipality. When a person, firm or corporation taxed under this section properly receives a credit on said taxes under the proviso in subsection (2) because of payments made to a municipality, such municipality's distributive share of the taxes levied by this section shall be reduced by the amount of the credit properly received by said person, firm or corporation. If the credit received under the proviso is greater than the municipality's distributive share of the taxes levied under this section, no distribution to such municipality shall be made.

Not later than fifteen days after the date on which each quarterly payment of taxes is due under this section, the Commissioner of Revenue shall report to the State Board of Assessment the amount collected under this section on account of receipts from local business conducted within each municipality. The State Board of Assessment shall examine such reports and, if found to be correct, shall certify a copy of the same to the State Auditor and State Treasurer. Upon certification by the State Board of Assessment, as herein provided, it shall be the duty of the State Auditor to issue warrant on the State Treasurer to the treasurer, or other officer authorized to receive public funds, of each municipality in the amount to

be distributed to each such municipality as herein provided.

In determining what constitutes local business conducted within a municipality for the purposes of this subsection, all business originating within a municipality,

except long-distance calls, shall be construed as local business.

The Department of Revenue is hereby authorized and empowered to require any and all persons, firms or corporations taxed under this section to file additional reports disclosing the gross receipts derived from local business as herein defined and the gross receipts from long-distance business.

If the records of the corporation taxed under this section do not readily disclose allocation to municipalities of revenues from local business as above defined, the Commissioner of Revenue shall prescribe some practicable method of allocating

such local revenues.

(5) Nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce.

(6) Counties, cities and towns shall not levy any franchise, license, or privilege

tax on the business taxed under this section. (1939, c. 158, s. 207; 1949, c. 392, s. 2.)

Editor's Note.—The 1949 amendment inserted new subsection (4), and renumbered old subsections (4) and (5) as (5) and (6), respectively. For brief comment on the

amendment, see 27 N. C. Law Rev. 482. Cited in Wood v. Carolina Tel., etc., Co., 228 N. C. 605, 46 S. E. (2d) 717, 3 A. L. R. (2d) 1 (1948).

§ 105-121: Repealed by Session Laws 1945, c. 752, s. 1.

Editor's Note.—The repealed section related to franchise or privilege taxes on insurance companies. For present law relating to taxes thereon, see §§ 105-228.3 to 105-228.10.

§ 105-121.1. Mutual burial associations.—An annual franchise or privilege tax on all domestic mutual burial associations shall be due and payable to the Commissioner of Revenue on or before the first day of April of each year. The amount of this franchise or privilege tax shall be based on the membership of such associations according to the following schedule:

Membership	less than 3,000	\$15.00
Membership	of 3,000 to 5,000	20.00
Membership	of 5,000 to 10,000	25.00
Membership	of 10,000 to 15,000	30.00
Membership	of 15,000 to 20,000	35.00
Membership	of 20,000 to 25,000	40.00
Membership	of 25,000 to 30,000	45.00
Membership	of 30,000 or more	50.00
(1943, c. 60,	s. 2.)	

- § 105-122. Franchise or privilege tax on domestic and foreign corporations.—(1) Every corporation, domestic and foreign, incorporated or, by any act, domesticated under the laws of this State, except as otherwise provided in this article or schedule, shall, on or before the thirty-first day of July of each year, make and deliver to the Commissioner of Revenue in such form as he may prescribe a full, accurate and complete report and statement verified by the oath of its duly authorized officers, containing such facts and information as may be required by the Commissioner of Revenue as shown by the books and records of the corporation as at the close of its last calendar or fiscal year next preceding July thirty-first of the year in which report is due.
- (2) Every such corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus and undivided profits; no reservation or allocation from surplus or undivided profits shall be allowed other than for definite and accrued legal liabilities, except as herein provided; taxes accrued, dividends declared and reserves for depreciation of tangible assets as permitted for income tax purposes shall be treated as deductible liabilities. Treasury stock shall not be considered in computing the capital stock, surplus and undivided profits as the basis for franchise tax, but shall be excluded proportionately from said capital stock, surplus and undivided profits as the case may be upon the basis and to the extent of the cost thereof. The capital stock for the purposes of this section shall be deemed to be inadequate to the extent that additional loans, credits, goods, supplies or other capital of whatsoever nature is furnished by the parent or affiliated corporation.

Every corporation doing business in this State which is a parent, subsidiary or affiliate of another corporation shall add to its capital stock, surplus and undivided profits all indebtedness owed to or endorsed or guaranteed by a parent, subsidiary or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. The term "indebtedness" as used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corpo-

ration. The terms "parent," "subsidiary," and "affiliate" as used in this paragraph shall have the meaning specified in § 105-143. If any part of the capital of the creditor corporation is capital borrowed from a source other than a parent, subsidiary or affiliate, the debtor corporation, which is required under this paragraph to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the said creditor corporation, may deduct from the debt thus included a proportionate part determined on the basis of the ratio of such borrowed capital as above specified of the creditor corporation to the total assets of the said creditor corporation. Further, in case the creditor corporation as above specified is also taxable under the provisions of this section, such creditor corporation shall be allowed to deduct from the total of its capital, surplus and undivided profits the amount of any debt owed to it by a parent, subsidiary or affiliated corporation to the extent that such debt has been included in the tax base of said parent, subsidiary or affiliated debtor corporation reporting for taxation under the provisions of this section.

(3) After ascertaining and determining the amount of its capital stock, surplus and undivided profits, as herein provided, every such corporation permitted to do business in this State shall allocate to such business in this State a proportion of the total amount of its capital stock, surplus and undivided profits as herein de-

fined, according to the following rules:

(A) If the principal business of a company in this State is manufacturing, or if it is in any form of collecting, buying, assembling, or processing goods and materials within this State the total amount of capital stock, surplus and undivided profits of such corporation shall be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:

- (a) The ratio of the book value of its real estate and tangible personal property in this State on the date of the close of the calendar or fiscal year of such corporation in the income year is to the book value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon.
- (b) The ratio of the total cost of manufacturing, collecting, buying, assembling, or processing within this State during the income year to the total cost of manufacturing, collecting, assembling, or processing within and without the State. The term "cost of manufacturing, collecting, buying, assembling, or processing within and without this State" as used herein shall be interpreted in a manner to conform as nearly as may be to the best accounting practice in the trade or business. Unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis, this term shall be generally interpreted to include as elements of cost within and without this State the following:
- (c) The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing, regardless of where purchased.
- (d) The total wages and salaries paid or accrued during the income year in such manufacturing, assembling, or processing activities.
- (e) The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling, or processing activities, not including, however, property, privilege, stamp or other taxes.
- (f) The term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis.
- (g) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

- (h) The word "manufacturing" shall be defined as mining and all processes of fabricating or of curing raw material.
- (B) If the principal business of a company in this State is selling, distributing, or dealing in tangible personal property within this State, the total amount of capital stock, surplus and undivided profits of such company shall be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:
- (a) The ratio of the book value of its real estate and tangible personal property in this State on the date of the close of the calendar or fiscal year of such company in the income year is to the book value of its entire real estate and tangible personal property then owned by it, with no deduction on account of encumbrances thereon.
- (b) The ratio of the total sales made through or by offices, agencies, or branches located in North Carolina during the income year to the total sales made everywhere during said income year.

(c) The word "sales" as used in this section shall be defined as sale or rental

of real estate and sale or rental of tangible properties.

- (d) The term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis.
- (e) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.
- (C) If the principal business in this State of a corporation is other than that described in subsection (A) or subsection (B) of this section, then the total amount of capital stock, surplus and undivided profits of such corporation shall be apportioned to North Carolina on the basis of the ratio of its gross receipts in this State during the income year to its gross receipts for such year within and without the State.
- (a) The words "gross receipts" as used in this subsection shall be taken to mean and include the entire receipts for business done by such corporation.
- (D) If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the Commissioner of Revenue has operated or will so operate as to subject it to taxation on a greater portion of its capital stock, surplus, and undivided profits than is reasonably attributable to business within the State, it shall be entitled to file with the Commissioner a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Commissioner may prescribe. If, after a consideration of the matters involved, it shall be found by the Commissioner upon evidence offered which is clear, cogent and convincing that the application of the allocation formula subjects the corporation to taxation on a greater portion of its capital stock, surplus and undivided profits than is reasonably attributable to business within this State, the Commissioner shall be authorized to add to the factors of the applicable allocation formula, or substitute for one of the factors of the applicable allocation formula, depending upon whether such addition or such substitution in the opinion of the Commissioner more accurately reflects the capital stock, surplus, and undivided profits attributable to this State, the following factor:

The ratio of the expenditure of the wages, salaries, commissions, or other compensation of whatsoever kind to its officers or employees, assignable to this State as hereinafter provided, to the total expenditure of the corporation for wages, salaries, commissions, or other compensation of whatsoever kind to all its officers or

employees. The amount assignable to this State of the expenditure of the corporation for wages, salaries, commissions or other compensation to its officers or employees shall be such expenditure for the taxable year as represents the compensation of officers or employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the State.

The relief herein authorized shall be granted by the Commissioner only in cases of clear, cogent, and convincing proof that the petitioning taxpayer is entitled There shall be a presumption that the allocation formulae prescribed in subsection (3) of this section reasonably attribute to North Carolina the proportion of the corporation's capital stock, surplus and undivided profits used in connection with its business in this State, and the burden shall rest upon the corporation to show the contrary. No corporation shall use this alternative factor in making a franchise tax report or return to this State except upon order in writing of the Commissioner, and any return in which the alternative factor is used without the permission of the Commissioner shall not be a lawful return.

(E) The proportion of the total capital stock, surplus and undivided profits of each such corporation so allocated shall be deemed to be the proportion of the total capital stock, surplus and undivided profits of each such corporation used in connection with its business in this State and liable for annual franchise tax un-

der the provisions of this section.

(4) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection three of this section, which amount so determined shall in no case be less than the total assessed value (including total gross valuation returned for taxation of intangible personal property) of all the real and personal property in this State of each such corporation for the year in which report is due nor less than its total actual investment in tangible property in this State, every corporation taxed under this section shall annually pay to the Commissioner of Revenue, at the time the report and statement are due, a franchise or privilege tax, which is hereby levied, at the rate of one dollar and fifty cents (\$1.50) per one thousand dollars (\$1,000.00) of the total amount of capital stock, surplus and undivided profits as herein provided. The tax imposed in this section shall in no case be less than ten dollars (\$10.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each such corporation in this State: Provided, that the basis for the franchise tax on all corporations, eighty per cent (80%) of whose outstanding capital stock is owned by persons or corporations to whom or to which such stock was issued prior to January first, one thousand nine hundred thirty-five. in part payment or settlement of their respective deposits in any closed bank of the State of North Carolina, shall be the total assessed value of the real and tangible personal property of such corporation in this State for the year in which report and statement is due under the provisions of this section. The term "total actual investment in tangible property" as used in this section shall be construed to mean the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon.

In determining the total tax payable by any corporation under this section and under § 105-115 there shall be allowed as a credit on such tax the amount of intangible tax paid during the preceding franchise tax year on bank deposits under the provisions of § 105-199, except that the minimum tax herein provided shall not be less than the ten dollars (\$10.00) elsewhere specified.

(5) The report, statement and tax required by this section shall be in addition to all other reports required or taxes levied and assessed in this State.

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under this section. (1939, c. 158, s. 210; 1941, c. 50, s. 4; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1947, c. 501, s. 3.)

Cross Reference.—See note to § 105-114. Editor's Note.—The 1941 amendment inserted the last sentence of the first paragraph of subsection (2). It also made changes in subdivision (C) of subsection (3) and designated a following paragraph under said subsection as (D).

The 1943 amendment rewrote portions of subsection (2). It also inserted subdivision (D) of subsection (3) and changed former subdivision "(D)" to "(E)."

The 1945 amendment rewrote the second paragraph of subsection (2), which appears as the first paragraph above, and added the second paragraph of subsection (4).

The 1947 amendment changed the tax rate in the first sentence of subsection (4) from \$1.75 to \$1.50 per one thousand dollars.

Power of Legislature.—It is within the legislative power of taxation, in respect to corporations, to levy any two or more of the following taxes simultaneously (1) on the franchise (including corporate dividends); (2) on the capital stock; (3) on the tangible property of the corporation, and (4) on the shares of the capital stock in the hands of the stockholders. The tax on the two subjects last named is imperative. Board v. Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423 (1895).

Foreign corporations do business here by comity of the State, and the latter may impose a license tax as a condition upon which such corporations may do business here under the protection of our laws, where such is not an interference with interstate commerce, or the tax is not otherwise invalid. Pittsburgh Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568 (1916).

Tax Is on Privilege of Existence.—By

Tax Is on Privilege of Existence. — By the express terms of Laws 1931, c. 427, s. 210, which was superseded by this section, the corporation was liable for the annual franchise tax for each year during which it enjoyed the privilege of the continuance of its charter. It was immaterial whether or not the corporation exercised its privilege of doing or carrying on the business authorized by its charter or certificate of incorporation; it was liable so long as it enjoyed the privilege granted by the State of "being" a corporation. Stagg v. Nessen Co., 208 N. C. 285, 180 S. E. 658 (1935).

Corporation Not Relieved of License

Corporation Not Relieved of License Tax on Carrying on Particular Business.—
The franchise tax imposed upon every corporation doing business in the State is a tax upon the privilege of being a corporation, and its payment does not relieve it, or its lessee, from the payment of a tax imposed upon the privilege of carrying on the particular kind of business for which the corporation was chartered. Cobb v. Commissioners, 122 N. C. 307, 30 S. E. 338 (1898).

Quoted in Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948).

105-123. New corporations.—(1) No corporation, domestic or foreign, shall be permitted to do business in this State without paying the franchise tax levied in this article or schedule. When such domestic corporation is incorporated under laws of this State or such foreign corporation is domesticated in this State, and has not heretofore done business in the State, upon which a report might be filed under § 105-122 notice in writing thereof shall be given to the Commissioner of Revenue by such corporation, and it shall be competent for the Commissioner of Revenue and he is hereby authorized to obtain such information concerning the basis for the levy of the tax from such other information he can obtain and to that end may require of such corporation to furnish him such a report as may clearly reflect and disclose the amount of its issued and outstanding capital stock, surplus and undivided profits as set out in § 105-122, and information as to such other factors as may be necessary to determine the basis of the tax. When this has been determined, in accordance with the provisions of § 105-122 as far as the same may be applicable, and upon the information which he has secured, the Commissioner of Revenue shall thereupon determine the amount of franchise tax to be paid by such new corporation, and said tax shall be due and payable within thirty days from date of notice thereof from the Commissioner of Revenue, which tax, in no event, shall be less than a ratable proportion of the tax for the franchise privilege extended for one year on the determined basis, nor less than the minimum tax of ten dollars (\$10.00); the tax levied in this section shall be for the period from date of incorporation or domestication to June thirtieth next following.

In the case of a corporation organized or domesticated within the State within the taxable year, which shall acquire the entire assets within the State of a corporation previously operating therein which shall have paid prior to the disposal of said assets the franchise tax for the taxable year, the newly organized or domesticated corporation shall be allowed to deduct that portion of the capital stock, surplus, and undivided profits, or other alternative tax base as provided in § 105-122 (4), of the prior corporation previously reported and taxed in the taxable year in determining the tax for the balance of the year upon such newly organized or domesticated corporation.

(2) Any corporation failing to notify the Commissioner of Revenue as provided for in subsection (1) of this section within sixty days after date of the incorporation or domestication of such corporation in this State shall be subject to all penalties and remedies imposed for failure to file any report required under

this article or schedule.

(3) The provisions of this section shall apply only to corporations newly incorporated or newly domesticated in this State. (1939, c. 158, s. 211; 1945, c. 708, s. 3.)

Editor's Note. — The 1945 amendment added the second paragraph to subsection (1).

- § 105-124. Review of returns—additional taxes. Upon receipt of any report, statement and tax as provided by this article or schedule, the Commissioner of Revenue shall cause same to be reviewed and examined for the purpose of ascertaining if same constitute a true and correct return as required by this article or schedule. If the Commissioner of Revenue discovers from the examination of any return, or otherwise, that the franchise or privilege tax of any taxpayer has not been correctly determined, computed and/or paid, he may at any time within three years after the time when the return was due, give notice in writing, to the taxpayer of such deficiency plus interest at the rate of six per cent (6%) per annum from date when return was due, and any overpayment of the tax shall be returned to the taxpayer within thirty days after it is ascertained. In the case of any taxpayer who has failed to file any return or statement required under this article or schedule, the limitation of three years shall not apply and the Commissioner of Revenue shall, from facts within his knowledge, prepare tentative returns for such delinquent taxpayer, and shall assess the taxes, penalties and interest upon these findings; this provision shall not be construed to relieve said taxpayer from liability for a return or from any penalties and remedies imposed for failure to file proper return. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the Commissioner of Revenue, if within thirty days after date of notice of such proposed assessment, the taxpayer shall apply in writing for such hearing, explaining in detail his objections to same. If no request for such hearing is made, such proposed assessment shall be final and conclusive. If the request for hearing is made, the taxpayer shall be heard by the Commissioner of Revenue, and after such hearing the Commissioner of Revenue shall render his decision. The taxpayer shall be advised of his decision by mail, and such amount shall be due and payable within ten days after date of notice thereof. (1939, c. 158, s. 212.)
- § 105-125. Corporations not mentioned.—None of the taxes levied in §§ 105-122 and 105-123 shall apply to religious, fraternal, benevolent, or educational corporations, not operating for a profit; nor to banking and insurance companies; nor to business leagues, boards of trade, clubs organized and operated exclusively for pleasure, recreation and other nonprofitable purposes, civic leagues operated exclusively for the promotion of social welfare, or chambers of commerce and merchants associations not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder, individual, or other corporations:

Provided, that each such corporation must, upon request by the Commissioner of Revenue, establish in writing its claim for exemption from said provisions. The provisions of §§ 105-122 and 105-123 shall apply to electric light, power, street railway, gas, water, Pullman, sleeping and dining car, express, telegraph, telephone, motor bus, and truck corporations to the extent and only to the extent that the franchise tax levied in §§ 105-122 and 105-123 exceed the franchise taxes levied in other sections of this article or schedule. The exemptions in this section shall apply only to those corporations specially mentioned, and no other. (1939, c. 158, s. 213.)

§ 105-126. Penalties for nonpayment or failure to file report.— (1) Any person, firm, or corporation, domestic or foreign, failing to pay the license, privilege, or franchise tax levied and assessed under this article or schedule when due and payable shall, in addition to all other penalties prescribed in this article, pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall not be less than two dollars (\$2.00) in any case, and shall be added to the tax, together with the interest accrued, and shall become an integral part of the tax.

(2) Any person, firm, or corporation failing to file the report required in this article or schedule on or before the date specified shall pay a penalty of ten per cent (10%) of the tax found to be due, which penalty shall in no case be less

than five dollars (\$5.00). (1939, c. 158, s. 214.)

§ 105-127. When franchise or privilege taxes payable.—(1) Every corporation, domestic or foreign, from which a report is required by law to be made to the Commissioner of Revenue, shall, unless otherwise provided, pay to said Commissioner annually the franchise tax as required by §§ 105-122 and 105-123.

(2) It shall be the duty of the Commissioner of Revenue to mail to the registered address, last listed with the Commissioner of Revenue, of every such corporation, report forms to be used in complying with the provisions of this article or schedule, which forms shall contain a copy of so much of this and other sections of this article as relates to penalties for failure to pay said taxes.

(3) It shall be the duty of the treasurer or other officer having charge of any such corporation, domestic or foreign, upon which a tax is herein imposed, to transmit the amount of the tax due to the Commissioner of Revenue within the

time provided by law for payment of same.

(4) Individual stockholders in any corporation, joint-stock association, limited partnership, or company paying a tax on its entire capital stock shall not be required to list or pay ad valorem taxes on the shares of stock owned by them.

- (5) Corporations in the State legally holding shares of stock in other corporations, upon which the tax has been paid to the State by the corporation issuing the same, shall not be required to list or pay an ad valorem tax on said shares of stock. (1939, c. 158, s. 215.)
- 8 105-128. Power of attorney.—The Commissioner of Revenue shall have the authority to require a proper power of attorney of each and every agent for any taxpayer under this article. (1939, c. 158, s. 217.)
- § 105-129. Extension of time for filing returns; fraudulent return made misdemeanor.—(1) The return required by this article or schedule shall be due on or before the dates specified unless written application for extension of time in which to file, containing reasons therefor, is made to the Commissioner of Revenue on or before due date of such return. The Commissioner of Revenue for good cause may extend the time for filing any return under this article or schedule, provided interest at the rate of six per cent (6%) per annum from date return is due is paid upon the total amount of tax due.

(2) The provisions of this article with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or additional tax shall not apply to the assessment of additional taxes upon fraudulent return. Any officer or agent of a corporation who shall knowingly make a fraudulent return under this article or schedule shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000,00) and/or imprisoned at the discretion of the court. (1939, c. 158, s. 216.)

ARTICLE 4.

Schedule D. Income Tax.

§ 105-130. Short title.—This article shall be known and may be cited as the income tax article of the Revenue Act. (1939, c. 158, s. 300.)

Editor's Note. — For discussion of by the Session Laws of 1949, see 27 N. C. changes made in this article by the Session Law Rev. 482. Laws of 1947, see 25 N. C. Law Rev. 467;

- § 105-131. Purpose.—The general purpose of this article is to impose a tax for the use of the State government upon the net income in excess of the exemption herein allowed, for the calendar year one thousand nine hundred and thirty-nine and each year thereafter collectible in the year one thousand nine hundred and forty and annually thereafter:
 - (a) Of every resident of the State. (b) Of every domestic corporation.

(c) Of every foreign corporation and of every nonresident individual having a business or agency in this State or income from property owned, and from every business, trade, profession or occupation carried on in this State.

(d) The tax imposed upon the net income of corporations in this article is in addition to all other taxes imposed under this subchapter. (1939, c. 158,

s. 301.)

§ 105-132. Definitions.—For the purpose of this article, and unless otherwise required by the context:

1. The word "taxpayer" includes any individual, corporation, or fiduciary

subject to the tax imposed by this article.

2. The word "individual" means a natural person.

- 3. A "head of a household" is an individual who actually maintains and supports in one household in this State one or more individuals who are closely related by blood relationship, relationship by marriage, or by adoption, and whose right to exercise family control and provide for these dependent individuals is based on some moral or legal obligation.
- 4. The word "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporation, acting

in any fiduciary capacity for any person, estate or trust.
5. The word "person" includes individuals, fiduciaries, partnerships.

6. The word "corporation" includes joint-stock companies or associations and insurance companies.

7. The words "domestic corporation" mean any corporation organized under

the laws of this State.

- 8. The words "foreign corporation" mean any corporation other than a do-
- 9. The words "tax year" mean the calendar year in which the tax is payable. 10. The words "income year" mean the calendar year or the fiscal year upon the basis of which the net income is computed under this article; if no fiscal year has been established, they mean the calendar year.

11. The words "fiscal year" mean an income year, ending on the last day of

any month other than December.

12. The word "paid," for the purposes of the deductions under this article, means "paid or accrued" and the words "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this article. The word "received," for the purpose of the computation of the net income under this article, means "received or accrued," and the words "received or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this article.

13. The word "resident" applies only to individuals and includes, for the purpose of determining liability for the tax imposed with reference to the income of any income year, all individuals who, at any time during such income year, are domiciled in this State, or who, whether regarding their domicile as in this State or not, reside within this State for other than a temporary or transitory purpose. In the absence of convincing proof to the contrary, any individual who is present within the State for more than six months during such income year shall be deemed to be a resident of the State; but absence from the State for more than six months shall raise no presumption that the individual is not a resident of the State.

In cases in which it is demonstrated to the satisfaction of the Commissioner of Revenue that an individual was a resident of this State for only part of the income year, having moved into or removed from the State during such year, such individual shall, as to income received by him during the period of his residence, report for taxation all income required to be so reported by residents and shall, as to income received by him during the remainder of such year, report for taxation all income required to be so reported by nonresidents: Provided, that in the case of an individual removing from the State during such year, he shall not be regarded as having become a nonresident until he shall have both established a definite residence elsewhere and abandoned any domicile he may have acquired in this State.

The fact that an individual is a nonresident of the State at the time the tax

becomes due and payable shall not affect his liability for the tax.

14. The words "foreign country" mean any jurisdiction other than the one embraced within the United States. The words "United States," when used in a geographical sense, include the states, and territories of Alaska and Hawaii, the District of Columbia, and the possessions of the United States. (1939, c. 158, s. 302; 1941, c. 50, s. 5.)

Editor's Note. — The 1941 amendment made changes in subsection 13. For comment on amendment, see 19 N. C. Law

Rev. 530.

For comment on definition of "head of household," see 17 N. C. Law Rev. 382.

Imposition of Income Tax.

§ 105-133. Individuals.—A tax is hereby imposed upon every resident of the State, which tax shall be levied, collected and paid annually, with respect to the net income of the taxpayer as herein defined, and upon income earned within the State of every nonresident having a business or agency in this State or income from property owned and from every business, trade, profession or occupation carried on in this State, computed at the following rates, after deducting the exemptions provided in this article.

On the excess over the amount legally exempted, up to two thousand dollars,

three per cent (3%).

On the excess above two thousand dollars, and up to four thousand dollars, four per cent (4%).

On the excess above four thousand dollars, and up to six thousand dollars, five per cent (5%).

On the excess over six thousand dollars, and up to ten thousand dollars, six per cent (6%).

On the excess over ten thousand dollars, seven per cent (7%). (1939, c. 158, s. 310.)

§ 105-134. Corporations.—I. Domestic Corporations.— Every corporation organized under the laws of this State shall pay annually an income tax equivalent to six per cent on the entire net income, as herein defined, received by such corporation during the income year.

II. Foreign Corporations.—Every foreign corporation doing business in this State shall pay annually an income tax equivalent to six per cent of a proportion

of its entire net income, to be determined according to the following rules:

1. If the principal business of a company in this State is manufacturing, or if it is any form of collecting, buying, assembling, or processing goods and materials within this State, the entire net income of such corporation shall be apportioned by North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:

(a) The ratio of the book value of its real estate and tangible personal property in this State on the date of the close of the calendar or the fiscal year of such corporation in the income year is to the book value of its entire real estate and tangible personal property then owned by it, when no deductions on account of

encumbrances thereon.

- (b) The ratio of the total cost of manufacturing, collecting, buying, assembling, or processing within this State during the income year to the total cost of manufacturing, collecting, buying, assembling, or processing within and without the State. The term "cost of manufacturing, collecting, buying, assembling, or processing within and without this State," as used herein, shall be interpreted in a manner to conform as nearly as may be to the best accounting practice in the trade or business. Unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis, this term shall be generally interpreted to include as elements of cost within and without this State the following:
- (c) The total cost of all goods, materials, and supplies used in manufacturing,

assembling, or processing, regardless of where purchased.

(d) The total wages and salaries paid or accrued during the income year in such manufacturing, assembling or processing activities.

(e) The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling or processing activities, not including, however, property, privilege, stamp or other taxes.

- (f) The term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis.
- (g) The words "tangible personal property" shall be taken to mean corporeal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(h) The word "manufacturing" shall be defined as mining and all processes

of fabricating or of curing raw materials.

2. If the principal business of a company in this State is selling, distributing or dealing in tangible personal property within this State, the entire net income of such company shall be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios.

(a) The ratio of the book value of its real estate and tangible personal property in this State on the date of the close of the calendar or fiscal year of such company in the income year is to the book value of its entire real estate and tangible property then owned by it, with no deduction on account of encumbrances thereon.

(b) The ratio of the total sales made through or by offices, agencies, or branches located in North Carolina during the income year to the total sales made everywhere during said income year.

- (c) The word "sales" as used in this section shall be defined as sale or rental of real estate and sale or rental of tangible properties.
- (d) The term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis.
- (e) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.
- 3. If the principal business in this State of a corporation is other than that described in subsection 1 or subsection 2 of subdivision II of this section, then the total income of such corporation shall be apportioned to North Carolina on the basis of the ratio of its gross receipts in this State during the income year to its gross receipts for such year within and without the State.
- (a) The words "gross receipts" as used in this subsection shall be taken to mean and include the entire receipts for business done by such company.
- 4. If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the Commissioner of Revenue has operated or will so operate as to subject it to taxation on greater portion of its net income than is reasonably attributable to business or earnings within the State, it shall be entitled to file with the Commissioner a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Commissioner may prescribe. If, after a consideration of the matters involved, it shall be found by the Commissioner upon evidence offered which is clear, cogent and convincing that the application of the allocation formula subjects the corporation to taxation on a greater portion of its income or earnings than is reasonably attributable to business or earnings within this State, the Commissioner shall be authorized to add to the factors of the applicable allocation formula, or substitute for one of the factors of the applicable allocation formula, depending upon whether such addition or such substitution in the opinion of the Commissioner more accurately reflects the income attributable to this State, the following factor:

The ratio of the expenditure of the wages, salaries, commissions or other compensation of whatsoever kind to its officers or employees, assignable to this State as hereinafter provided, to the total expenditure of the corporation for wages, salaries, commissions, or other compensation of whatsoever kind to all its officers or employees. The amount assignable to this State of the expenditure of the corporation for wages, salaries, commissions or other compensation to its officers or employees shall be such expenditure for the taxable year as represents the compensation of officers or employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the State.

The relief herein authorized shall be granted by the Commissioner only in cases of clear, cogent, and convincing proof that the petitioning taxpayer is entitled thereto. There shall be a presumption that the allocation formulae prescribed in subdivisions one (1), two (2), and three (3) of Part II of this section reasonably attribute to North Carolina the proportion of the corporation's income earned in this State, and the burden shall rest upon the corporation to show the contrary. No corporation shall use this alternative factor in making a report or return of its income to this State except upon order in writing of the Commissioner, and any return in which the alternative factor is used without the

permission of the Commissioner shall not be a lawful return. (1939, c. 158, s. 311; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 752, s. 3.)

Editor's Note - The 1941 amendment changed subdivision 3 of subsection II, and the 1943 amendment added subdivision 4.

The 1945 amendment struck out former paragraph (f) of subdivision 2 of subsection II, relating to foreign insurance com-

For note on constitutionality of income allocation formulae as applied to corpora-

tions, see 9 N. C. Law Rev. 470.

For case construing the early income tax laws, see Hans Rees' Sons v. North Carolina, 283 U. S. 123, 51 S. Ct. 385, 75 L. Ed. 879 (1931).

Burden of Showing Statutory Assessment Unconstitutional. - Where the Commissioner of Revenue assessed an income tax against a foreign corporation operating a manufacturing plant in this State in accordance with the provisions of § 311 of the Revenue Act of 1929, without regard to its intangible property, the Commissioner's assessment was upheld upon appeal where the corporation failed to show that such method of allocation was unconstitutional in its application to the corporation. State v. Kent-Coffey Mfg. Co., 204 N. C. 365, 168 S. E. 397 (1933).

8 105-135. Income from stock in foreign corporations.—Income from stock in foreign corporations, in cash dividends, received by individuals, fiduciaries, partnerships (to be reported by partners on their individual returns) or corporations, resident in this State, or by nonresident fiduciary if held for a resident of this State, shall be reported and taxed as other income taxable under this article. Every individual, fiduciary, partnership, or corporation owning such shares of stock, and receiving dividends from same, shall report such income to the Commissioner of Revenue, at the time required by this article for reporting other income, and shall pay the tax herein imposed at the same time and in the same way as tax upon other income is payable. With respect to corporations paying a tax in this State on a proportionate part of their total income, the holder of shares of stock in such corporation shall pay on the total dividends received an amount equaling the percentage of the corporation's income on which it has not paid an income tax to the State of North Carolina for the year in which said dividends are received by the taxpayer. (1939, c. 158, s. 3111/2.)

Stock Received as Dividend Taxable.-Where plaintiff, owning stock in a foreign investment corporation, received as a dividend on such stock, stock of another foreign corporation, the stock received as a dividend was taken from the surplus of the

investment corporation and was equivalent to a cash dividend, and was taxable as income from stock in a foreign corporation. Maxwell v. Tull, 216 N. C. 500, 5 S. E. (2d) 546 (1939).

§ 105-136. Railroads and public service corporations.—The basis of ascertaining the net income of every corporation engaged in the business of operating a steam, electric railroad, express service, telephone or telegraph business, or other form of public service, when such company is required by the Interstate Commerce Commission to keep records according to its standard classification of accounting, shall be the "net revenue from operations" of such corporation as shown by their records, kept in accordance with that standard classification of accounts when their business is wholly within this State, and when their business is in part within and in part without the State, their net income within this State shall be ascertained by taking their gross "operating revenues" within this State, including in their gross "operating revenues" within this State the equal mileage proportion within this State of their interstate business, and deducting from their gross "operating revenues" the proportionate average of "operating expense" or "operating ratio" for their whole business, as shown by the Interstate Commerce Commission standard classification of accounts: Provided, that if the standard classification of operating expenses prescribed by the Interstate Commerce Commission for railroads differs from the standard classification of operating expenses prescribed by the Interstate Commerce Commission for other public service corporations, such other public service corporations shall be entitled to the same operating expenses as prescribed for

railroads. From the net operating income thus ascertained shall be deducted "uncollectible revenue" and taxes paid in this State for the income year other than income taxes, and the balance shall be deemed to be their net income taxable under this article. In determining the taxable income of a corporation engaged in the business of operating a railroad under this section in the case of a railroad located entirely within this State, the net operating income shall be increased or decreased to the extent of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire; and when any railroad is located partly within and partly without this State, the said net operating income shall be increased or decreased to the extent of an equal mileage proportion within this State of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire.

For the purposes of this section the words "interstate business" shall mean, as to transportation companies, operating revenue earned within the State by reason of the interstate transportation of persons or property into, out of, or through this State, and as to transmission companies the interstate transmission of messages into, out of, or through the State.

The words "equal mileage proportion within the State" shall mean the proportion of revenue received by the company operating in this State from interstate business as defined in the preceding paragraph, which the distance of movement over lines in this State bears to the total distance of movement over lines of the company receiving such revenue. If the Commissioner of Revenue shall find, with respect to any particular company, that its accounting records are not kept so as to reflect with exact accuracy such division of revenue by State lines as to each transaction involving interstate revenue, the Commissioner of Revenue may adopt such regulations, based upon averages, as will approximate with reasonable accuracy the proportion of interstate revenue actually earned upon lines in this State.

The words "proportionate average of 'operating expenses' or 'operating ratio'" shall mean the proportion of gross revenue of a company, on its whole business absorbed in operating expenses, as defined in the Interstate Commerce Commission classification of accounts.

In determining the taxable income of a railroad company operating two or more lines of railroad not physically connected, and when one of such railroad lines is located wholly within this State, the actual earnings and expenses of such line in this State, in so far as they may be severable, shall be used in determining net income taxable in this State.

With respect to leased lines operated in this State where the operating company pays a tax on the income earned on such leased lines, without deduction for lease rental, and on a sum properly allocable to such leased lines equal to the amount of lease rental paid, such lease rental shall not be taxable income against the lessor; provided that the stockholders of any such lessor corporation who receive dividends on their stock in such corporation shall be entitled to such income tax exemption with respect to such dividends as they would have had if the lessor corporation had paid an income tax on such exempted lease rental.

All other public service corporations shall file under § 105-134.

In any case when the State of North Carolina jointly with the federal government has made any advances or has made any loans to a nonoperating railroad in which the State of North Carolina owns more than a majority of the capital stock, which advances or loans are made for the purpose of rehabilitating the properties of such railroad and are to be repaid by the operating railroad in the form of special and additional rents, such special or additional rents so paid shall be deducted from operating revenues in determining the net taxable income of such operating railroad. This deduction shall be allowable for the taxable years beginning with the year ending December thirty-first, one thousand nine

hundred and forty-four, and subsequent years. (1939, c. 158, s. 312; 1941, c. 50, s. 5; 1945, c. 708, s. 4.)

Editor's Note. — The 1941 amendment added the proviso to the sixth paragraph of this section, and the 1945 amendment added the last paragraph.

Commissioner of Revenue Must Follow Formula Provided by Section.—In assessing income taxes against a corporation the Commissioner of Revenue must follow this section, leaving the question of whether the result is arbitrary or unwarranted to the determination of the courts upon appeal of the corporation. Maxwell v. Norfolk, etc., Ry. Co., 208 N. C. 397, 181 S. E. 248 (1935).

Formula Not Void upon Its Face. — For ascertaining the net income of an interstate railway taxable within this State the formula provided by this section is not void

upon its face, but may be unworkable or unfair when applied to a particular railway in particular conditions. Norfolk, etc., Ry. Co. v. North Carolina, 297 U. S. 682, 56 S. Ct. 625, 80 L. Ed. 977 (1936).

Burden of Proving Use of Formula Wrong Is on Claimant.—The burden of proving that the use of the formula provided by this section arbitrarily attributes net income to the part of its line within this State derived from its business outside of the State is upon the railway claimant. Norfolk, etc., Ry. Co. v. North Carolina, 297 U. S. 682, 56 S. Ct. 625, 80 L. Ed. 977 (1936). See also, Maxwell v. Norfolk, etc., Ry. Co., 208 N. C. 397, 181 S. E. 248 (1935).

§ 105-137. Taxable year.—The tax imposed by this article for the year one thousand nine hundred and thirty-nine shall be assessed, collected, and paid in the year one thousand nine hundred and forty and for the year one thousand nine hundred and forty and years thereafter shall be assessed, collected, and paid in the year following the year for which the assessment is made. (1939, c. 158, s. 313.)

§ 105-138. Conditional and other exemptions.—The following organizations shall be exempt from taxation under this article:

1. Fraternal beneficiary societies, orders or associations.

(a) Operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

(b) Providing for the payment of life, sick, accident, or other benefits to the

members of such society, order or association, or their dependents.

2. Building and loan associations and co-operative banks without capital stock,

organized and operated for mutual purposes and without profit.

3. Cemetery corporations and corporations organized for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual.

4. Business leagues, chambers of commerce, merchants' associations, or boards of trade not organized for profit, and no part of the net earnings of which inures

to the benefit of any private stockholder or individual.

5. Civic leagues or organizations not organized for profit, but operated ex-

clusively for the promotion of social welfare.

6. Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit

of any private stockholder or member.

7. Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or co-operative telephone companies, or like organizations of a purely local character the income of which consists solely of assessments, dues and fees collected from members for the sole purpose of meeting expenses.

8. Farmers', fruit growers', or like organizations organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the

basis of the quantity of product furnished by them.

9. Mutual associations formed under §§ 54-111 to 54-128, formed to conduct

agricultural business on the mutual plan; or to marketing associations organized under §§ 54-129 to 54-158.

Nothing in this subsection shall be construed to exempt any co-operative, mutual association or other organization from an income tax on net income (gross income minus operating expenses, including interest paid on capital stock) which has not been allocated to patrons on a patronage basis and distributed either in cash, stock, certificates, or in some other manner that discloses to each patron the amount of his patronage refund; provided, that no stabilization or marketing organization, which handles agricultural products for sale for producers on a pool basis, shall be deemed to have realized any net income or profit in the disposition of a pool or any part of a pool until all of the products in that pool shall have been sold and the pool shall have been closed; provided, further, that a pool shall not be deemed closed until the expiration of at least 90 days after the sale of the last remaining product in that pool. Such cooperatives and other organizations shall file an annual informational return with the State Department of Revenue on forms to be furnished by the Commissioner and shall include therein the names and addresses of all persons, patrons and/or shareholders, whose patronage refunds or interest on stock amount to \$50.00 or more.

- 10. Pension, profit sharing, stock bonus and annuity trusts, or combinations thereof, established by employers for the purpose of distributing both the principal and income thereof exclusively to eligible employees, or the beneficiaries of such employees, and so constituted that no part of the corpus or income may be used for, or diverted to, any purpose other than for the exclusive benefit of the employees or their beneficiaries; provided, there is no discrimination, as to eligibility requirements, contributions or benefits, in favor of officers, share-holders, supervisors, or highly paid employees; provided further, that the interest of individual employees participating therein shall be irrevocable and nonforfeitable to the extent of any contributions made thereto by such employees; and provided further, the Commissioner of Revenue shall be empowered to promulgate rules and regulations regarding the qualification of such trusts for exemption under this subsection. The exemption of any trust under the provisions of the federal income tax law shall be a prima facie basis for exemption of said trust under this paragraph. This subdivision shall be effective from and after January first, one thousand nine hundred and forty-four.
- 11. Insurance companies paying the tax on gross premiums as specified in § 105-228.5. (1939, c. 158, s. 314; 1945, c. 708, s. 4; c. 752, s. 3; 1949, c. 392, s. 3.)

Editor's Note. — The first 1945 amendment added subsection 10, and the second 1945 amendment added subsection 11. The graph.

- § 105-139. Fiduciaries.—The tax imposed by this article shall be imposed upon resident fiduciaries having in charge funds or property for the benefit of a resident of this State, and/or income earned in this State for the benefit of of a nonresident, and upon a nonresident fiduciary having in charge funds or property for the benefit of a resident of this State, which tax shall be levied, collected and paid annually with respect to:
- (a) That part of the net income of estates or trusts which has not become distributable during the income year.
- (b) The net income received during the income year by deceased individuals who, at the time of death, were residents and who have died during the tax year or the income year without having made a return.
- (c) The entire net income of resident, insolvent, or incompetent individuals, whether or not any portion thereof is held for the future use of the beneficiaries, where the fiduciary has complete charge of such net income.

- (d) The tax imposed upon a fiduciary by this article shall be a charge against the estate or trust. (1939, c. 158, s. 315.)
- § 105-140. Net income defined.—The words "net income" mean the gross income of a taxpayer, less the deductions allowed by this article. (1939, c. 158, s. 316.)
- § 105-141. Gross income defined.—1. The words "gross income" mean the income of a taxpayer derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce or sales, or dealings in property, whether real or personal, located in this or any other state or any other place, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever and in whatever form paid. The amount of all such items shall be included in the gross income of the income year in which received by the taxpayer, unless, under the methods of accounting permitted under this article, any such amounts are to be properly accounted for as of a different period. The term "gross income" as used in this article shall include the salaries of all constitutional State officials taking office after the date of the enactment of this article by election, reelection or appointment, and all acts fixing the compensation of such constitutional State officials are hereby amended accordingly. The term "gross income" and the words "business, trade, profession, or occupation," and the words "salaries, wages, or compensation for personal services," as used in this article, shall include compensation received for personal service as an officer or employee of the United States, any territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, including compensation as an officer or employee of the executive, legislative, or judicial branches of the government of the United States and of the military, naval, coast guard or other services thereof.

The term "gross income" as used in this article shall include income from annuities based on three per cent (3%) of the consideration or cost of the annuity or contract as income yearly: Provided, that during the continuance of the second World War persons serving in the armed forces of the United States, military, naval, marine or coast guard, shall not be required to include in gross income their salary compensation for such service from the government of the United States. This exemption shall not extend to any other income of person

serving in the armed forces.

The Commissioner of Revenue is hereby authorized, in his discretion, to adopt rules and regulations providing that recoveries of bad debts or similar items which have been charged off by banks or other business under the regulations and supervision of a State agency, where such charge-offs were required to be made by said supervising State agency, shall be includible in gross income to the same extent as such recoveries are includible in gross income under the federal income tax laws in effect at the time of the issuance of said rules and regulations, or to adopt such other rules and regulations regarding such recoveries as may be deemed just, reasonable and proper. The rules and regulations may be made applicable to charge-offs made prior to January first, one thousand nine hundred and forty-five, but not recovered until after January first, one thousand nine hundred and forty-five.

2. The words "gross income" do not include the following items, which shall be exempt from taxation under this article, but shall be reported in such form and manner as may be prescribed by the Commissioner of Revenue.

and manner as may be prescribed by the Commissioner of Revenue:

(a) The proceeds of life insurance policies and contracts paid upon the death

of the insured to beneficiaries or to the estate of the insured.

(b) The amount received by the insured as a return of premium or premiums

paid by him under life insurance endowment contracts, either during the term or at the maturity of the term mentioned in the contracts or upon surrender of the contract.

(c) The value of property acquired by gift, bequest, devise or descent (but

the income from such property shall be included in gross income).

(d) Interest upon the obligations of the United States or its possessions, or of the State of North Carolina, or of a political subdivision thereof: Provided, interest upon the obligations of the United States, shall not be excluded from gross income unless interest upon obligations of the State of North Carolina or any of its political subdivisions is excluded from income taxes imposed by the United States. Except that interest upon the obligations of the United States or its possessions, or of the State of North Carolina, or of a political subdivision thereof, shall in no case be included in the "gross income" of any banking corporation organized under the banking laws of North Carolina.

(e) Any amounts received through accident or health insurance or under the Workmen's Compensation Act, as compensation for personal injuries or sickness, plus the amount of any damages received, whether by suit or agree-

ment, on account of such injuries or sickness.

(f) The rental value of any dwelling and the appurtenances thereof furnished to a minister of the gospel as a part of his compensation; also the rental value of any homes and quarters and the appurtenances thereof furnished the officers and employees of orphanages, whose duties require them to live on the premises and in buildings owned by such institutions, as a part of their compensation. (1939, c. 158, s. 317; 1941, c. 50, s. 5; c. 283; 1943, c. 400, s. 4; 1945, c. 708, s. 4; c. 752, s. 3.)

Editor's Note.— The 1941 amendments changed the last sentence of the first para-

graph of subsection 1.

The 1943 amendment added the proviso to the second paragraph of subsection 1, and rewrote former paragraph (f) of subsection 2.

The first 1945 amendment inserted the last paragraph of subsection 1 relating to the recoveries of charged-off debts, and added present paragraph (f) at the end of subsection 2. The second 1945 amendment struck out former paragraph (f) relating to domestic insurance companies or associations.

For comment on definition of rents from foreign real estate, see 17 N. C. Law Rev.

A gain resulting from the involuntary conversion of a capital asset by fire was taxable under the State law as income, notwithstanding that the proceeds of the fire insurance plus additional cash were necessary for and used in the restoration of the building, under this section and § 105-142, prior to the passage of § 105-144.1. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533 (1949).

Former Exemption of Compensation from Federal Government.—The provision of a former statute exempting from income tax that part of gross income received from salaries, wages, or other compensation from the federal government was held to apply to individuals only and not to corporations, foreign or domestic. Atlantic Coast Line R. Co. v. Maxwell, 207 N. C. 746, 178 S. E. 592 (1935).

Salaries of State and Federal Officers.— It was formerly held that the State could not tax the salary of a federal officer, nor or a State officer whose office was created by the Constitution. Purnell v. Page, 133

N. C. 125, 45 S. E. 534 (1903).

§ 105-142. Basis of return of net income.—1. The net income of a tax-payer shall be computed in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but such method of accounting must be consistent with respect to both income and deductions, but if in any case such method does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income, but shall follow as nearly as practicable the federal practice, unless contrary to the context and intent of this article.

2. A taxpaper may, with the approval of the Commissioner of Revenue, and under such regulations as he may prescribe, change the income year from fiscal

year to calendar year or otherwise, in which case his net income shall be computed upon the basis of such new income year: Provided, that such approval must be obtained from the Commissioner at least thirty days prior to the end of

such income year.

3. An individual carrying on business in partnership shall be liable for income tax only in his individual capacity, and shall include in his gross income, whether distributed or not, his distributive share of the net income of the partnership and dividends from foreign corporations for each income year. If an established business in this State is owned by a nonresident individual or by a partnership having one or more nonresident members, the manager of the business in this State shall report the earnings of such business in this State, and the distributive share of the income of each nonresident owner or partner and pay the tax as levied on individuals in this article for each such nonresident owner or partner. The exemption and other deductions allowed individuals in this article may be deducted on a pro rata basis if the nonresident owner or partner furnishes to the manager of such business in this State complete information as to the total net income and total deductions allowable under this article to residents of this State, so that the same may be prorated in proportion to the income and deductions in this State and in the state of residence. The individual or partnership business carried on in this State may deduct the payment required to be made for such nonresident individual or partner or partners from their distributive share of the profits of such business in this State.

4. Every individual taxable under this article who is a beneficiary of an estate or trust shall include in his gross income the distributive share of the net income of the estate or trust received by him or distributable to him during the income year. Unless otherwise provided in the law, the will, the deed, or other instrument creating the estate, trust, or fiduciary relation, the net income shall be deemed to be distributed or distributable to the beneficiaries (including the fiduciary as a beneficiary, in the case of income accumulated for future distribu-

tion), ratable in proportion to their respective interest.

5. In the case of trusts which qualify for exemption under § 105-138 (10), employees or their beneficiaries shall include in their gross incomes only the amounts actually received or made available to them within the income year; provided, that if such employees have made contributions to such trusts, and the benefits are received as periodical payments, the amounts annually received shall be taxed as an annuity to the extent of three per cent (3%) of the amount of such contributions, until the excess of receipts over and above the portion thus taxable as an annuity shall equal the total contributions, at which time all receipts thereafter received shall be annually taxable; provided further, that if such employees have made contributions to such trusts and the benefits are received in lump sum payments, only that portion of such receipts in excess of contributions shall be taxable. This subdivision shall be effective from and after January first, one thousand nine hundred and forty-four.

6. An individual, who patronizes or owns stock or has membership in a farmers' marketing or purchasing co-operative or mutual, organized under subchapter 4 or subchapter 5 of chapter 54 of the General Statutes of North Carolina, shall include in his gross income for the year in which the allocation is made his distributive share of any savings or interest on stock, whether distributed in cash or credit, allocated by the co-operative or mutual association for each income year. (1939, c. 158, s. 318; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1949, c. 392, s. 3.)

Editor's Note.— The 1943 amendment added that part of subsection 3 beginning with the second sentence. The 1945 amendment added subsection 5. And the 1949, amendment added subsection 6.

A gain resulting from the involuntary

conversion of a capital asset by fire was taxable under the State law as income, not-withstanding that the proceeds of the fire insurance plus additional cash were necessary for and used in the restoration of the building, under this section and § 105-141,

prior to the passage of § 105-144.1. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533 (1949).

Requirement That Commissioner of Revenue Follow Federal Practice.—Subsection 1 of this section, stipulating that the Commissioner of Revenue shall follow the federal practice as nearly as practicable in instances where the method of accounting

of the taxpayer does not clearly reflect the income of the taxpayer, does not require the Commissioner to apply the provisions of sec. 112(f), 26 U. S. C. A. 95, in computing the income of a taxpayer from involuntary conversion of a capital asset. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533 (1949). See § 105-144.1 and notes.

§ 105-143. Subsidiary and affiliated corporations.—The net income of a corporation doing business in this State which is a subsidiary or affiliate of another corporation shall be determined by eliminating all payments to or charges by the parent corporation or other subsidiaries or affiliates of the parent corporation in excess of fair compensation for all services performed for or commodities or property sold, transferred, leased, or licensed to the parent or to its other subsidiary or affiliated corporations by the corporation doing business in this State. If the Commissioner of Revenue shall find as a fact that a report by such subsidiary or affiliated corporation does not disclose the true earnings of such corporation on its business carried on in this State, the Commissioner may require that such subsidiary or affiliated corporation file a consolidated return of the entire operations of such parent corporation and of its subsidiaries and affiliates, including its own operations and income, and may determine the true amount of net income earned by such subsidiary or affiliated corporation in this State by taking the factor of investment in real estate and tangible personal property in this State and volume of business in this State and by relating these factors to the total investment of the parent corporation and its subsidiaries and affiliated corporations in real estate and tangible personal property in and out of this State and their total volume of business in and out of this State. The authority hereby given to require consolidated returns as aforesaid and to ascertain the true amount of income earned in this State on the basis herein prescribed may also be used by the Commissioner as the basis of ascertaining the true net income earned in this State during the calendar year one thousand nine hundred and forty and for the three calendar years prior thereto. For the purposes of this section, a corporation shall be deemed a subsidiary of another corporation hereby designated the parent corporation, when, directly or indirectly, it is subject to control by such other corporation by stock ownership, interlocking directors, or by any other means whatsoever exercised by the same or associated financial interests, whether such control is direct or through one or more subsidiary, affiliated, or controlled corporations, and a corporation shall be deemed an affiliate of another corporation when both are directly or indirectly controlled by the same parent corporation or by the same or associated financial interests by stock ownership, interlocking directors, or by any other means whatsoever, whether such control be direct or through one or more subsidiary, affiliated or controlled corporations. Upon such finding by the Commissioner, the consolidated returns authorized by this section may be required whether the parent or controlling corporation or interest or its subsidiaries or affiliates are or are not doing business in this State. The provisions of this paragraph do not apply to corporations subject to regulations by a regulatory body of this State which are required to maintain accounts in such manner as to reflect separately the business done in this State and file a report thereof with such regulatory body. This paragraph shall not apply unless the Commissioner further finds that the business in this State is handled or effected in such manner as to distort or not reflect the true income earned in this State and finds in addition either or both of the following facts: (a) that the several corporations are owned or controlled by the same financial interests or (b) that they are members of a group of corporations associated together in carrying on a unitary business or

are branches or parts of a unitary business or are engaged in different phases of the same general business or industry. If such consolidated return is required and is not filed within sixty days after demand, said subsidiary or affiliated corporation shall be subject to the penalty provided in this act for failure to file returns and in addition shall be subject to the penalty provided in § 105-230, and in such event the provisions of subsection 5 of § 105-161 shall apply.

Every subsidiary of a parent corporation doing business in this State shall not be allowed to deduct interest on indebtedness owed to or endorsed or guaranteed by the parent corporation and used by the subsidiary in carrying on its business in this State. This term "indebtedness" used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by the parent corporation, or by any subsidiary of the parent corporation. The term "parent corporation" shall include any subsidiary of the parent corporation. If any part of the capital used by the parent corporation is borrowed capital, the subsidiary may deduct from its gross income interest paid to the parent corporation in such proportion as the borrowed capital of the parent corporation is to the total assets of such parent corporation. The term "borrowed capital" used in this paragraph shall include all loans and credits obtained by the parent corporation and also all goods, supplies or other capital of whatever nature borrowed by the parent corporation.

Such subsidiary or affiliated corporation shall incorporate in its returns required under this section and article such information as the Commissioner may reasonably require for the determination of the net income taxable under this article, and shall furnish such additional information as the Commissioner may reasonably require. If the return does not contain the information therein required or such additional information is not furnished within thirty days after demand, the corporation shall be subject to a penalty of one hundred dollars a day for each day's omission, in addition to the penalty provided in § 105-230.

If the Commissioner finds that the determination of the income of a subsidiary or affiliated corporation under a consolidated return as herein provided will produce a greater or lesser figure than the amount of income earned in this State, he may readjust the determination by reasonable methods of computation to make it conform to the amount of income earned in this State; and if the corporation contends the figure produced is greater than the earnings in this State, it shall, within thirty days after notice of such determination, file with the Commissioner a statement of its objections and of an alternative method of determination with such detail and proof as the Commissioner may require, and the Commissioner shall consider the same in determining the income earned in this State. In making such determination the findings and conclusions of the Commissioner shall be presumed to be correct and shall not be set aside unless shown to be plainly wrong. (1939, c. 158, s. 318½; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4.)

Editor's Note.—The 1941 amendment rewrote this section, and the 1943 amendment rewrote the second paragraph.

The 1945 amendment inserted in the fourth sentence of the first paragraph the words "hereby designated the parent corporation," and substituted in the sixth and seventh sentences the word "paragraph" for the word "section." The amendment also struck out the former third sentence of paragraph two which read: "The term 'subsidiary corporation' as used in this paragraph shall mean any corporation, a majority of stock in which is owned by a parent corporation."

The word "act" in the last sentence of the first paragraph probably should read "subchapter."

§ 105-144. Determination of gain or loss.—For the purpose of ascertaining the gain or loss from the sale or other disposition of property, real, personal, or mixed, the basis shall be, in the case of property acquired before January first, one thousand nine hundred and twenty-one, the fair market price or the value of such property as of that date and in all other cases the cost thereof.

The cost of such property acquired prior to January first, one thousand nine hundred and twenty-one, would be used in all cases if such cost is known or determinable: Provided, that in the case of property which was included in the last preceding annual inventory used in determining net income in a return under this article, such inventory value shall be taken in lieu of costs or market value. The final distribution to the taxpayer of the assets of a corporation shall be treated as a sale of the stock or securities of the corporation owned by him, and the gain or loss shall be computed accordingly: Provided, no gain or loss shall be recognized upon the receipt of a corporation of property distributed in complete liquidation of another corporation, if the corporation receiving such property was on the date of the adoption of the plan of liquidation and has continued to be at all times until the receipt of the property the owner of stock (in such other corporation), possessing at least eighty per centum (80%) of the total combined voting power of all classes of stock entitled to vote, and the owner of at least eighty per centum (80%) of the total number of shares of all other classes of stock (except nonvoting stock which is limited and preferred as to dividends). (1939, c. 158, s. 319: 1941, c. 50, s. 5.)

Editor's Note. — The 1941 amendment sentence the words "stock or securities" for substituted near the beginning of the last "stock of securities."

§ 105-144.1. Involuntary conversions; recognition of gain or loss; replacement fund and surety bond.—If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations which the Commissioner may, in his discretion, prescribe, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain shall be recognized. but loss shall be recognized if such loss would be recognized under this article if such conversion had been voluntary. If any part of the money is not so expended, the gain, if any, shall be recognized to the extent of the money which is not so expended (regardless of whether such money is received in one or more taxable years). In the event a placement fund is established, the Commissioner may require the taxpayer to deposit with him a surety bond or a bond secured by sufficient collateral, in double the amount of the tax which would be assessable if the funds or any part thereof were not used in the replacement of the property compulsorily or involuntarily converted, which bond shall be conditioned upon using such replacement fund in replacing such property within a reasonable time, not to exceed one year after the receipt of the funds by the taxpayer, to be determined by the Commissioner, which time may be extended by the Commissioner from time to time not to exceed a total time of three years within which the replacement fund may be so used or expended, and such bond shall further be conditioned upon the payment of the tax which would have been assessable if the property had been voluntarily converted if the taxpayer fails to use the fund for the replacement of the involuntarily converted property within the time allowed by the Commissioner.

The establishment of a replacement fund and the giving of bond as herein provided shall be deemed a waiver by the taxpayer of any statute limiting the time within which the Commissioner may make an assessment against the taxpayer on account of any taxable gain which may have been realized from such involuntary conversion, and the Commissioner may make such assessment at any time within three years after the expiration of the time or extended time within which the taxpayer shall have been permitted to expend the replacement fund in the replacement of the property involuntarily converted. If an assessment is made, such assessment shall be for the year or years in which the gain would

have been taxable if no replacement fund had been established, and to such tax so assessed there shall be added all penalties and interest applicable to such year or years.

As used in this section, the term "control" means the ownership of stock possessing at least eighty per centum (80%) of the total combined voting power of all classes of stock entitled to vote, and at least eighty per centum (80%) of the total number of shares of all other classes of stock of the corporation.

In the administration of this section, the Commissioner may, in his discretion, apply the federal rules and regulations, rulings, and federal court decisions pertinent to the administration and construction of § 112 (f) of the Federal Internal Revenue Code, but the Commissioner shall not be bound by such rules and regulations, rulings and decisions. (1949, c. 1171.)

Federal Regulations and Rulings Adopted by Commissioner.—On May 5, 1949, the Commissioner of Revenue of North Carolina promulgated a regulation for the purpose of administering this section, in which he adopted the federal rules and regulations, rulings and federal court decisions pertinent to the administration and construction of section 112 (f) of the Internal Revenue Code. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533 (1949).

Pending Litigation.—The mere statement in the act from which this section was codified that it is to affect pending litigation, will not be construed as sufficient au-

thority to authorize the Commissioner of Revenue to refund to a taxpayer a tax legally assessed and collected prior to the enactment of the act. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533 (1949).

Section Does Not Authorize Refund of Tax Previously Collected.—This section adopting the federal rule for determining income tax upon the involuntary conversion of a capital asset, does not authorize the Commissioner of Revenue to refund income tax legally assessed and collected upon such capital gain prior to the enactment of this section, even though the tax was paid under protest. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533 (1949).

§ 105-145. Exchanges of property.—1. When property is exchanged for other property of like kind, the property received in exchange shall be considered as a conversion of assets from one form to another, from which no gain or loss shall be deemed to arise.

2. In the case of the organization of a corporation, the stock or securities received shall be considered to take the place of property transferred therefor, and

no gain or loss shall be deemed to arise therefrom.

3. (a) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(b) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(c) As used in this section, the term "reorganization" includes a statutory merger or consolidation, a transfer by a corporation of all or a part of its assets to another corporation, if immediately after the transfer the transferor or its shareholders, or both, are in control of the corporation to which the assets are transferred, or a recapitalization, or a mere change in identity, form, or place of organization, however effected.

(d) As used in this section, the term "a party to a reorganization" includes the corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another, and the term "control" means the ownership of stock possessing at least eighty (80%) per cent of the total combined voting power of all classes of stock entitled to vote and at least eighty per cent (80%) of the total number of shares of all other classes of stock of the corporation.

4. The basis of property received by a corporation upon a distribution in complete liquidation of another corporation within the meaning of § 105-144 shall be

the same as it would be in the hands of the transferor. (1939, c. 158, s. 320; 1943, c. 400, s. 4.)

Editor's Note.—The 1943 amendment rewrote subsection 3.

- § 105-146. Inventory. Whenever, in the opinion of the Commissioner of Revenue, it is necessary, in order clearly to determine the income of any tax-payer, inventories shall be taken by such taxpayer upon such basis as the Commissioner of Revenue may prescribe, conforming as nearly as may be to the best accounting practice in the trade or business and most clearly reflecting the income. (1939, c. 158, s. 321.)
- § 105-147. Deductions.—In computing net income there shall be allowed as deductions the following items:
- 1. All the ordinary and necessary expenses paid during the income year in carrying on any trade or business, including:

(a) As to individuals, reasonable wages of employees for services rendered

in producing such income.

(b) As to partnership, reasonable wages of employees and a reasonable allowance for copartners or members of a firm, for services actually rendered in producing such income, the amount of such salary allowance to be included in the personal return of the copartner receiving same.

(c) As to corporations, wages of employees and salaries of officers, if reasonable in amount, for services actually rendered in producing such income.

1½. In the case of an individual, all the ordinary and necessary expenses paid or incurred during the income year for the production or collection of income, or for the management, conservation, or maintenance of property held for the

production of income.

134. All the ordinary and necessary expenses paid during the income year by any teacher, principal or superintendent of the public schools of the State for the purpose of attending summer school in any accredited college or university. Ordinary and necessary expenses shall be construed to include tuition, matriculation fees, registration fees, amounts paid for books and necessary classroom supplies, subsistence and individual athletic supplies. The deductions authorized under this subsection shall be allowed only upon the presentation to the Commissioner of Revenue, or his authorized agent, receipts showing the expenditures made hereunder; provided, said sums shall not exceed the sum of two hundred and fifty dollars (\$250.00) for any one year.

2. Rentals or other payments required to be made as a condition of the continued use or possession for the purpose of the trade of property to which the taxpayer has not taken or is not taking title, or in which he has no equity.

3. Unearned discount and all interest paid during the income year on indebtedness except interest paid or accrued in connection with the ownership of real or personal property the current income from which is not taxable under this article, and except interest paid by a subsidiary to a parent corporation as defined in § 105-143. Interest on indebtedness incurred for the purchase of stock of corporations paying a tax on their entire net income under this article shall be deductible, and a ratable proportion of such interest with respect to corporations paying a tax on a proportion of their net income.

4. Taxes paid or accrued during the income year, except income taxes, gift taxes, taxes levied under § 105-135, inheritance and estate taxes, and taxes assessed for local benefit of a kind tending to increase the value of the property assessed. No deduction shall be allowed under this section for gasoline tax, sales tax, automobile license or registration fee by individuals not engaged in trade or business, nor shall deduction be allowed for taxes paid or accrued in connection with the ownership of property, the current income from which is not taxable under this article. All payments made by an employer into a fed-

eral fund as provided by the provisions of Title VIII and Title IX of the Federal Social Security Act, and all payments made by an employer as provided by a state unemployment compensation law: Provided, that none of the foregoing provisions shall apply to that part of such payments required to be deducted by an employer from the earnings of an employee. "Income taxes" which are not allowed to be deducted under this section shall be construed to include taxes that are in fact based upon net income, although such taxes may be levied in another state as franchise or excise taxes. The exclusion or deduction of income taxes in another state shall in each case depend upon whether the tax was in fact a tax upon net income by whatever name called.

5. Dividends from stock in any corporation, the income of which shall have been assessed, and the tax on such income paid by the corporation under the provisions of this article: Provided, that when only part of the income of any corporation shall have been assessed under this article, whether paid directly to the taxpayer or paid to the taxpayer by a trustee of a distributable trust, only a corresponding part of the dividends received therefrom shall be deducted. In the case of insurance companies taxed under the provisions of § 105-228.5 the dividends from stock in domestic insurance corporations shall be deductible and a proportionate part of any dividends received from stock in foreign insurance corporations shall be deductible, such part to be determined on the basis of the ratio of premiums reported for taxation in this State to total premiums collected both in and out of the State.

5½. Interest received by a parent corporation on indebtedness owed to it by a subsidiary corporation doing business in North Carolina, which, in the determination of the taxable net income of such subsidiary corporation was not allowed as a deduction from gross income under the provisions of § 105-143.

6. Losses of such nature as designated below:

(a) Losses of capital or property used in trade or business actually sustained during the income year except that: No deduction shall be allowed for losses arising from personal loans, endorsements or other transactions of a personal nature not entered into for profit; and losses of such character as specified in subdivision (c) below shall be deductible only to the extent therein provided.

(b) Losses of property not connected with a trade or business sustained in the income year if arising from fire, storm, shipwreck or other casualties or theft to the extent such losses are not compensated for by insurance or otherwise.

(c) Losses incurred in the income year from the sale of corporate shares or bonds of corporations or governments owned less than one year, or from transactions in commodity futures contracts where the transactions are of such nature that no title to actual commodities passes, provided that the amount of loss deductible in any year shall be limited to the extent of gains from similar sources in the same year. In determining the amount of loss deductible in any year any losses arising from sales or transactions as specified in this subdivision may be offset against any gains arising from any sales or transactions as specified in this subdivision. Losses incurred from trading in commodity contracts shall be deductible without respect to gains from any sources specified herein in cases where the loss claimed shall arise from hedging operations carried on in connection with an established business or in connection with market operations regularly conducted which involve the purchase and sale of tangible commodities.

(d) Losses in the nature of net economic losses sustained in either or both of the two preceding income years arising from business transactions or to capital or property as specified in (a) and (b) above subject to the following limitations:

First, the purpose in allowing the deduction of net economic loss of a prior year or years is that of granting some measure of relief to taxpayers who have incurred economic misfortune or who are otherwise materially affected by strict adherence to the annual accounting rule in the determination of taxable income, and the deduction herein specified does not authorize the carrying forward of

any particular items or category of loss except to the extent that such loss or losses shall result in the impairment of the net economic situation of the tax-payer such as to result in a net economic loss as hereinafter defined,

Second, the net economic loss for any year shall mean the amount by which allowable deductions for the year other than contributions, personal exemptions, prior year losses, taxes on property held for personal use, and interest on debts incurred for personal rather than business purposes shall exceed income from all sources in the year including any income not taxable under this article.

Third, any net economic loss of a prior year or years brought forward and claimed as a deduction in any income year may be deducted from taxable income of the year only to the extent that such carry-over loss from the prior year or years shall exceed any income not taxable under this article received in the same year in which the deduction is claimed, except that in the case of foreign corporations, and of domestic corporations or resident individuals eligible for the deduction of a part of net income under the provisions of subsection ten of this section by reason of having net income earned and taxed in another state, only such proportionate part of the net economic loss of a prior year or years shall be deductible from the income taxable in this State as would be determined by the ratio of net income allocable to this State as compared to all net income received both within and without the State. For such corporations and resident individuals as specified herein any income properly allocable without the State shall be disregarded in offsetting income not taxable under this article against the amount of any prior year loss to determine the amount of prior year loss deductible from taxable income in any year.

Fourth, a net economic loss carried forward from any year shall first be applied to, or offset by, any income taxable or nontaxable of the next succeeding year before any portion of such loss may be carried forward to a second succeeding year. If there is any income taxable or nontaxable in the first succeeding year not otherwise offset only the balance of any carry-over loss may be carried

forward to a second year.

Fifth, the amount of any loss arising from sales or transactions as specified in subdivision (c) above and not allowed as a deduction for the year in which such loss occurred may be carried forward for deduction in either or both of the succeeding years but only to the extent that such loss when added to other deductions permitted in the second limitation above shall result in a net economic loss as defined in the said second limitation. Further, any portion of such loss from sales or transactions specified in subdivision (c) above which is carried forward to one or both of the two succeeding years may be deducted from taxable income in either year only to the extent of gain not otherwise offset from similar sales or transactions in the year in which such deduction is claimed, but not to exceed such amount as would be permitted as a deduction under the other limitations above.

Sixth, no loss shall either directly or indirectly be carried forward more than two years.

7. Debts ascertained to be worthless and actually charged off within the income year, if connected with business and, if the amount has previously been included in gross income in a return under this article; or, in the discretion of the

Commissioner, a reasonable addition to a reserve for bad debts.

7½. Amounts expended by an individual during the year for medical care and insurance against illness or accident for himself, or herself, and dependents, and for funeral expenses for dependents leaving no net estate, to the extent that the total of such expenditures not compensated for by insurance or otherwise shall exceed five per centum of net income computed without the benefit of the deduction authorized in this subdivision. The deduction authorized in this subdivision shall apply only to amounts that were actually paid in the income year, and the total allowable deduction in any tax year shall not exceed twenty-five hundred dollars (\$2,500.00).

8. A reasonable allowance for depreciation and obsolescence of property used in the trade or business shall be measured by the estimated life of such property; and in case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion. The cost of property acquired since January first, one thousand nine hundred and twenty-one, plus additions and improvements, shall be the basis for determining the amount of depreciation, and if acquired prior to that date the book value as of that date of the property shall be the cost basis for determining depreciation.

In cases of mines, oil and gas wells, and other natural deposits, the cost of development not otherwise deducted will be allowed as depletion, and in the cases of leases, the deduction allowed may be equitably apportioned between the

lessor and lessee.

In case the federal government determines depreciation or depletion of property for income tax purposes upon the basis of book value instead of original cost, the depreciation allowed under this article shall be upon the same basis.

- 9. Contributions or gifts made by individuals, firms, partnerships and corporations within the income year to corporations, trusts, community chests, funds, foundations or associations organized, and operated exclusively for religious, charitable, literary, scientific, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or contributions or gifts made by individuals, firms, partnerships and corporations within the income tax year to posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual: Provided, that in the case of such contributions or gifts by corporations and partnerships, the amount allowed as a deduction hereunder shall be limited to an amount not in excess of five (5%) per centum of the corporation's or partnership's net income, as computed without the benefit of this subdivision; and provided that in the case of such contributions or gifts by individuals, the amount allowed as a deduction shall be limited to an amount not in excess of ten (10%) per centum of the individual's net income, as computed without the benefit of this subsection.
- 9½. Amounts actually expended by an individual, other than a married woman having a separate and independent income, who is not entitled to a personal exemption of two thousand dollars (\$2,000.00) under the provisions of subdivisions (a), (b), (c), and (d) of subsection one of § 105-149 in maintaining one or more dependent relatives in an institution for the care of mental or physical defectives irrespective of whether such dependent relatives be above or below the age of eighteen: Provided, that the deduction authorized in this section shall apply only to actual expenditures in excess of the amounts allowed as personal exemption for dependents under the provisions of subdivision (e) of subsection one of § 105-149, and the maximum amount that may be deducted by an individual under the authorization herein stated shall not exceed eight hundred dollars (\$800.00).
- 9¾. Contributions by persons and corporations to the State of North Carolina, any of its institutions, instrumentalities, or agencies, any county of this State, its institutions, instrumentalities, or agencies, any municipality of this State, its institutions, instrumentalities, or agencies.

10. Income earned in another state, nation, territory or possession (hereinafter referred to as "state") by resident individuals and domestic corporations to the extent hereinafter provided.

(a) Domestic corporations having an established business in another state, or investment in property in another state, may deduct the net income from such business or property if the said net income is taxed under an income tax levied

by the state or states in which the business or property is located. The deduction herein authorized shall not include income received from stocks, bonds, notes, mortgages, securities, or bank or other deposits or credits, except to the extent that it may be shown that such securities or credits or the income therefrom are a part of an established business in another state and that the income therefrom has been taxed by such other state or states in connection with the established business therein. In case a deduction is claimed under the provisions herein stated for income earned and taxed in another state, the amount allocated to another state or other states and claimed as a deduction shall not exceed such an amount as would be determined to be allocable to such other state or states by the application of the same allocation ratio as is specified in Part II of 8 105-134 for the allocation of the net income of a foreign corporation operating a similar type of business in this State, unless any domestic corporation claiming the deduction of a portion of net income in excess of an amount determined by the application of said ratio shall submit sufficient evidence to prove to the satisfaction of the Commissioner of Revenue that the portion claimed as a deduction is properly allocable to another state or other states. In determining the maximum amount of net income properly allocable to another state or other states the respective allocation fraction shall apply to net income only after the subtraction of any net income from stocks, bonds, or other securities or credits excluded above from the deduction herein authorized. In all cases a domestic corporation which has an established business or investment in property in another state which does not levy an income tax shall treat any income or loss from such business or investment as though it occurred from a business or investment in North Carolina.

The provision above stated for the deduction of income that is earned and taxed in another state as net income shall be construed to include income that is earned and taxed in another state even though the tax thereon may be levied in such other states as a franchise or excise tax. The deduction of income earned and taxed in another state shall depend upon whether the tax is in fact a tax upon net income irrespective of what name may be given thereto.

(b) Resident individuals having an established business or an investment in

- (b) Resident individuals having an established business or an investment in real or tangible property in another state or other states may deduct the net income from such business or property but only to the extent that such income is in fact reported for taxation in such other state or states which levies or levy a net income tax. The deduction herein authorized shall not apply to income for personal services or income from any other source than an established business or real and/or tangible property owned in another state except to the extent provided in § 105-151. Resident individuals who have an established business or investment in property in another state which does not levy an income tax on the income therefrom shall treat any income or loss from such business or investment as though it occurred from a business or investment in North Carolina.
- (c) The deductions authorized in this section for income earned and taxed in another state by domestic corporations and resident individuals shall not include income earned in another state from the lease or rental of movable personal property unless such property shall be regularly located in such other state in connection with an established business therein. For purposes of this section no business shall be deemed to be an established business in another state unless an office or plant at some fixed place of business is maintained in connection therewith.
- 11. In the case of a nonresident individual, the deductions allowed in this section shall be allowed only if and to the extent that they are connected with income arising from sources within the State; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the State shall be determined under rules and regulations prescribed by the Commissioner of Revenue.

- 12. In computing net income no deduction shall be allowed under this section relating to salaries, wages, or other expenses, rentals or other similar payments, interest or taxes, if (1) the same are not actually paid within the taxable year or within two and one-half $(2\frac{1}{2})$ months after the close thereof; and (2) if, by reason of the method of accounting of the person or corporation to whom the payment is to be made, the amount thereof is not, unless actually paid, includible in the gross income of such person or corporation for the taxable year in which or with which the taxable year of the taxpayer ends. In the case of taxpayers who keep their accounts and report for income tax purposes on a cash basis, items of expenditure of such nature as specified above in this subsection shall not be allowed as a deduction unless such were actually paid within the income year for which a report is made.
- 13. Reasonable amounts paid by employers within the income year to trusts which qualify for exemption under subsection ten of § 105-138; provided, that amounts which are deductible for federal income tax purposes shall be prima facie allowable as deductions hereunder; provided further, that, in the case of taxpayers on the accrual basis, they shall be deemed to have made payments on the last day of the year of accrual if actual payments are made within sixty days after the close of such year. This subsection shall be effective from and after January first, one thousand nine hundred and forty-two.
- 14. Payments made by a divorced or estranged spouse to his or her spouse who is living separate and apart from the spouse making such payments for the separate support and maintenance of such spouse, whether made pursuant to an order of court or under the terms of an agreement, oral or written, between the parties. The deduction authorized by this subsection shall in no case exceed the amount actually paid or one thousand dollars (\$1,000.00), whichever is smaller. In case a spouse is making payments to more than one divorced or estranged spouse living separate and apart from the spouse making the payments for their separate support and maintenance, payments made under the conditions outlined above may be deducted by the spouse making the payments up to the payments made to each such spouse or one thousand dollars (\$1,000.00) each, whichever is smaller. Any individual who reports his income to the State of North Carolina for income tax purposes on an accrual basis may claim the deductions authorized by this subsection if the payments claimed as a deduction are actually made within seventy-five (75) days after the close of the taxpayer's fiscal or calendar year, whichever is used. No deduction shall be allowed under this subsection for payments made for the support of dependents, whether made directly to the dependents or to the spouse for the support of such dependents. When a sum is to be paid under the conditions outlined above to a spouse living separate and apart from the spouse making the payments for the support of said spouse and a dependent or dependents of the spouse making the payments, only the amount paid for the support of the spouse (not to exceed \$1,000.00) shall be claimed as a deduction under this subsection.

When a legal obligation to support a divorced or estranged spouse living separate and apart from his or her spouse is satisfied by the payment of a lump sum or a transfer of property, the amount of such lump sum payment or the market value of such property at the time of the conveyance thereof, or one thousand dollars (\$1,000.00), whichever is smaller, may be claimed as a deduction under this subsection. The deduction claimed under this paragraph must be claimed for the income year in which the payment is made or the transfer of property is effected and no deduction on account thereof may be claimed in any subsequent year: Provided, that when a taxpayer reports income for income tax purposes on the accrual basis, the deduction authorized by this paragraph may be claimed on that basis and no subsequent deduction shall be allowed under this paragraph. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c.

400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3.)

Editor's Note. — The 1941 amendment

made changes in subsection 10.

The first 1943 amendment added the second exception in the first sentence of subsection 3, and the last two sentences of subsection 4. It also inserted subsection 51/2, made changes in subsection 6, rewrote subsection 9 and made changes in subsection 10. The second 1943 amendment rewrote subsection 9.

The first 1945 amendment rewrote subsections 6 and 10, added subsections 71/2, 91/2 and 13, changed the last word of subsection 9 from "section" to "subsection." and added the second sentence of subsec-The second 1945 amendment added the second sentence of subsection 5.

The first 1947 amendment added subsections 11/2 and 13/4, added the part of subsection 7 appearing after the semicolon, added the second sentence of subsection 71/2 and substituted "forty-two" for "fortyfour" in the last line of subsection 13. The second 1947 amendment inserted in subsection 9 the provision as to contributions to organizations of war veterans, etc.

The 1949 amendment added subsections

93/4 and 14.

For comment on subsection 12, see 17 N. C. Law Rev. 383. For discussion of the provisions of this and other sections of the North Carolina income tax law designed to guard against excessive duplicate taxation. see 27 N. C. Law Rev. 582.

Income from Business Situated in Another State.-In order for a resident taxpayer to be entitled to deduct income derived from a business situated in another state from his income taxable by this State. the taxpaver must show that he has a business or investment in such other state, that the income therefrom is taxable in that state, and that the questioned income is derived from such business or investment. Sabine v. Gill, 229 N. C. 599, 51 S. E. (2d) 1 (1948).

Same-Business Conducted by Trustees. -Where the taxpayer was entitled to a portion of the income from a business carried on in another state by trustees, the state of the situs of the business taxed the income therefrom, and the profit from the business was paid to a trustee in this State, which distributed the income, the taxpayer did not "have" a business in such other state so as to bring her within the purview of subsection 10 of this section. Sabine v. Gill, 229 N. C. 599, 51 S. E. (2d) 1 (1948).

§ 105-148. Items not deductible. — In computing net income no deduction shall in any case be allowed in respect of:

(a) Personal, living, or family expenses.

(b) Any amount paid out for new buildings or for permanent improvements or betterments, made to increase the value of any property or estate.

(c) Premiums paid on any life insurance policy.

(d) Income, excess profits and gift taxes, including federal tax on undistributed earnings.

(e) Social security and unemployment tax paid by employee.

(f) Contributions to individuals.

(g) Commutation expenses.

(1939, c. 158, s. 323; 1941, c. 50, s. 5; 1943, c. 400, s. 4.)

Editor's Note. - The 1941 amendment relating to contributions or gifts by corpoadded a provision relating to contributions by partnerships. This provision and one

rations were omitted by the 1943 amend-

§ 105-149. Exemptions.—1. There shall be deducted from the net income the following exemptions:

(a) In the case of a single individual, a personal exemption of one thousand

dollars (\$1,000.00).

(b) In the case of a married man with a wife living with him, two thousand dollars (\$2,000.00), or in the case of a person who is the head of a household and maintains the same and therein supports one or more dependent relatives, under eighteen years of age, or, if over eighteen years of age, incapable of selfsupport because mentally or physically defective, two thousand dollars (\$2,000.00).

(c) A married woman having a separate and independent income, one thousand

dollars (\$1,000.00).

(d) In the case of a widow or widower having minor child or children, nat-

ural or adopted, two thousand dollars (\$2,000.00).

(e) Three hundred dollars (\$300.00) for each individual (other than husband and wife) dependent upon and receiving his chief support from the tax-payer, if such dependent individual is under eighteen years of age or is incapable of self-support because mentally or physically defective or is regularly enrolled for full-time study in a school, college, or other institution of learning. Exemptions for the children of taxpayers shall be allowed under this subsection only to the person entitled to the \$2,000.00 exemption provided in subsection (b) of this subdivision.

(f) In the case of a fiduciary filing a return for that part of the net income of estates or trusts which has not become distributable during the income year one thousand dollars (\$1,000.00). Provided, that in cases where two or more trusts have been established for the benefit of the same individual or beneficiaries the exemption allowed each of such trusts shall be such amount as would be determined by dividing one thousand dollars (\$1,000.00) ratably among such trusts in proportion to the corpus of each.

In the case of a fiduciary filing a return for the net income received during the income year of a deceased resident or nonresident individual who has died during the tax year or income year without having made a return, two thousand dollars (\$2,000.00) if the individual was a married man, and one thousand dollars (\$1,000.00) if the individual was single or a married woman not qualifying as "head of a household."

In the case of a fiduciary filing a return for an insolvent or incompetent individual resident or nonresident where the fiduciary has complete charge of such net income the same exemption to which the beneficiary would be entitled.

(g) In the case of a divorced person having the sole custody of a minor child or children and receiving no alimony for the support of himself, herself, child, or

children two thousand dollars (\$2,000.00).

- (h) In the case of any person who is totally blind, such person shall be entitled to an additional exemption of one thousand dollars (\$1,000.00) in addition to all other exemptions allowed by law. Provided, such person shall submit to the Department of Revenue a certificate from a physician certifying that such condition exists.
- 2. The exemptions allowable under this section shall be denied to an individual having income both within and without this State unless the entire income of such individual is shown in his or her return to this State; and if the entire income of such individual is shown in his or her return, the exemptions allowable under this section shall be denied in the proportion that the income earned outside of this State bears to the total income both within and without this State; provided, that when an individual includes in his or her gross income taxable in this State income earned in another state and no deduction is claimed under this article because said income is earned outside of this State, such individual shall be allowed the same exemption under this section as a person earning all of his or her income in this State.
- 3. The status on the last day of the income year shall determine the right to the exemptions provided in this section: Provided, that a taxpayer shall be entitled to such exemption for husband or wife or dependents who have died during the income year. (1939, c. 158, s. 324; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1947, c. 501, s. 4; 1949, c. 392, s. 3; c. 1173.)

Editor's Note.—The 1941 amendment made changes in subsection (b) of subdivision 1 and added the second sentence of subsection (e).

The 1943 amendment made changes in the second paragraph of subsection (f) of subdivision 1.

The 1945 amendment added at the end of the first sentence of subsection (e) of subdivision 1 the words "or is regularly enrolled for full-time study in a school, college, or other institution of learning." It also added the proviso to the first paragraph of subsection (f) and added subsec-

The 1947 amendment rewrote sub-

division 2.

The first 1949 amendment increased the amount in line one of subsection (e) of subdivision 1 from two hundred to three hundred dollars, and the second 1949 amendment added subsection (h).

§ 105-150. Exemption as to insurance or other compensation received by veterans.—Any American residing in the State of North Carolina who joined any of the allied armies during the World War and who, on account of injuries received while in service, receives insurance or compensation from any of the allied countries is hereby exempt from liability for income tax on such insurance or compensation in the State of North Carolina. The benefits of this section are hereby extended to and include those coming within the provisions of said section serving at any time between December seventh, one thousand nine hundred and forty-one and the termination of World War II. (1929, c. 184; 1945. c. 968. s. 1.)

Editor's Note. - The 1945 amendment added the second sentence of this section.

§ 105-151. Exemption of compensation for personal services of residents taxed elsewhere; credit allowed nonresident taxpayer. — 1. The salaries, wages, or other compensation received during the income year by a resident of this State for personal services rendered outside of this State shall not be taxable in this State if he is required to pay an income tax thereon to another state or taxing jurisdiction other than the United States; but the same shall be included in his return to this State for the purpose of prorating the

exemptions allowed by § 105-149, as therein provided.

2. Whenever a taxpayer other than a resident of the State has become liable to income tax to the state or country where he resides upon his net income for the taxable year, derived from sources within this State and subject to taxation under this article, the Commissioner of Revenue shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed: Provided, that such credit shall be allowed only if the laws of said state or country (1) grant a substantially similar credit to residents of this State subject to income tax under such laws, or (2) impose a tax upon the personal incomes of its residents derived from sources in this State and exempt from taxation the personal incomes of residents of this State. No credit shall be allowed against the amount of the tax on any income taxable under this article which is exempt from taxation under the laws of such other state or country. The exemption of credits allowed in this subsection shall not apply to the income of established unincorporated businesses in this State subject to tax under subsection three (3) of § 105-142. (1939, c. 158, s. 325; 1941, c. 50, s. 5; c. 204, s. 1; 1943, c. 400, s. 4.)

rewrote subsection 1, and the 1943 amendment added subsection 2.

For discussion of the provisions of this

Editor's Note. — The 1941 amendments and other sections of the North Carolina income tax law designed to guard against excessive duplicate taxation, see 27 N. C. Law Rev. 582.

§ 105-152. Returns. — 1. The following persons shall file with the Commissioner of Revenue an income tax return under affirmation, showing therein specifically the items of gross income and the deductions allowed by this article, and such other facts as the Commissioner may require for the purpose of making any computation required by this article:

(a) Every resident and nonresident who is a single person and who has a net income during the income year of over one thousand dollars (\$1000.00) which is

taxable in this State.

(b) Every resident or nonresident who is married but is not living with his or her wife or husband, and who has a net income during the income year of over one thousand dollars (\$1000.00) which is taxable in this State.

(c) Any resident or nonresident married woman, whether or not she is living with her husband, who has a net income during the income year of over one

thousand dollars (\$1000.00) which is taxable in this State.

(d) Every resident or nonresident man who is married and is living with his wife, and who has a net income during the income year of over two thousand dollars (\$2000.00), which is taxable in this State.

(e) Every resident or nonresident who is "head of a household" as defined in § 105-149 (1) (b) and who has a net income during the income year of over

two thousand dollars (\$2000.00) which is taxable in this State.

(f) Every resident of this State having a gross income from a business, agency or profession in excess of five thousand dollars (\$5000.00).

(g) Every nonresident having a gross income from a business, agency or pro-

fession within this State in excess of five thousand dollars (\$5000.00).

(h) Every resident or nonresident who is a widow or widower, having minor child or children, natural or adopted, and who has a net income during the income year of over two thousand dollars (\$2000.00) which is taxable in this State.

(i) Every resident or nonresident who has an income during the income year from sources both within and without this State in excess of the prorated ex-

emption provided for by § 105-149 (2).

(j) Every partnership having a place of business in the State as provided in § 105-154.

(k) Every corporation doing business in this State.

- (1) Any person or corporation whom the Commissioner believes to be liable for a tax under this article, when so notified by the Commissioner and requested to file a return.
- 2. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by a guardian or other person charged with the care of the person or property of such taxpayer.
- 3. The return of a corporation shall be signed by the president, vice-president, or other principal officer, and by the treasurer or assistant treasurer. There shall be annexed to the return the affirmation of the officers signing the same, which shall be in the form prescribed in § 105-155 of this article, and the same penalties prescribed in § 105-155 shall apply to any person making willful misstatements in said returns.
- 4. The return of an individual, who, while living, received income in excess of the exemption during the income year, and who has died before making the return, shall be made in his name and behalf by the administrator, or executor of the estate, and the tax shall be levied upon and collected from his estate.
- 5. When the Commissioner of Revenue has reason to believe that any tax-payer so conducts the trade or business as either directly or indirectly to distort his true net income and the net income properly attributable to the State, whether by the arbitrary shifting of income, through price fixing, charges for service, or otherwise, whereby the net income is arbitrarily assigned to one or another unit in a group of taxpayers carrying on business under a substantially common control, he may require such facts as he deems necessary for the proper computation of the entire net income and the net income properly attributable to the State, and in determining same the Commissioner of Revenue shall have regard to the fair profit which would normally arise from the conduct of the trade or business.
- 6. When any corporation liable to taxation under this article conducts its business in such a manner as either directly or indirectly to benefit the members or stockholders thereof or any person interested in such business by selling its

products or goods or commodities in which it deals at less than the fair price which might be obtained therefor, or where a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and disposes of the products of the corporation so owning a substantial portion of its stock in such a manner as to create a loss or improper net income for either of said corporations, or where a corporation, owning directly or indirectly a substantial portion of the stock of another corporation, acquires and disposes of the products of the corporation of which it so owns a substantial portion of the stock in such manner as to create a loss or improper net income for either of said corporations, the Commissioner of Revenue may determine the amount of taxable income of either or any such corporations for the calendar or fiscal year, having due regard to the reasonable profits which, but for such arrangement or understanding, might or could have been obtained by the corporation or corporations liable to taxation under this article from dealing in such products, goods or commodities. (1939, c. 158, s. 326; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4.)

Editor's Note.—The 1941 amendment struck out a former provision relating to required return and settlement of tax by corporation before dissolution. The 1943 amendment rewrote subsection 1, and the 1945 amendment rewrote subsection 3.

Cited in Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240 (1948).

- § 105-153. Fiduciary returns.—1. Every fiduciary subject to taxation under the provisions of this article, as provided in § 105-139, shall make a return under oath for the individual, estate or trust for whom or for which he acts, if the net income thereof exceeds the personal exemptions.
- 2. The return made by a fiduciary shall state specifically the items of gross income and the deductions and exemptions allowed by this article, and such other facts as the Commissioner of Revenue may prescribe.
- 3. Fiduciaries required to make returns under this article shall be subject to all the provisions of this article which apply to individuals. (1939, c. 158, s. 327.)
- § 105-154. Information at the source. 1. Every individual, partnership, corporation, joint-stock company or association, or insurance company, being a resident or having a place of business in this State, in whatever capacity acting, including lessors or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the State or of any political subdivision of the State, having the control, receipt, custody, disposal, or payment of interest (other than interest coupons payable to bearer), rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits, and incomes above exemptions allowed in this article, paid or payable during any year to any taxpayer, shall make complete return thereof to the Commissioner of Revenue under such regulations and in such form and manner and to such extent as may be prescribed by him.
- 2. Every partnership having a place of business in the State shall make a return, stating specifically the items of its gross income and the deductions allowed by this article, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributable, and the amount of the distributive share of each individual, together with the distributive shares of corporation dividends. The return shall be signed by one of the partners under affirmation in the form prescribed in § 105-155 of this article, and the same penalties prescribed in § 105-155 shall apply in the event of a willful misstatement.
- 3. Every corporation doing business or having a place of business in this State shall file with the Commissioner of Revenue, on such form and in such manner as he may prescribe, the names and addresses of all taxpayers, residents of North

Carolina, to whom dividends have been paid and the amount of such dividends during the income year. (1939, c. 158, s. 328; 1945, c. 708, s. 4.)

Editor's Note.—The 1945 amendment rewrote the second sentence of subsection 2.

§ 105-155. Time and place of filing returns.—Returns shall be in such form as the Commissioner of Revenue may from time to time prescribe, and shall be filed with the Commissioner at his main office, or at any branch office which he may establish, on or before the fifteenth day of March in each year, and for all taxpayers using a fiscal year, within seventy-five days after expiration of the fiscal year. In case of sickness, absence, or other disability or whenever in his judgment good cause exists, the Commissioner may allow further time for filing returns.

There shall be annexed to the return the affirmation of the taxpayer making the return in the following form: "I hereby affirm that this return, including the accompanying schedules and statements (if any) has been examined by me, and, to the best of my knowledge and belief, is true and complete and is made in good faith covering the taxable period stated, pursuant to the Revenue Act of one thousand nine hundred and thirty-nine, as amended and the regulations issued under authority thereof, and that this affirmation is made under the penalties of perjury. The return shall also be signed by a competent witness of the signature." Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury. The Commissioner shall cause to be prepared blank forms for the said returns, and shall cause them to be distributed throughout the State, and to be furnished upon application; but failure to receive or secure the form shall not relieve any taxpayer from the obligation of making any return herein required. (1939, c. 158, s. 329; 1943, c. 400, s. 4.)

Editor's Note.—The 1943 amendment rewrote all of the second paragraph except Paving Co., 7 F. Supp. 424 (1934). the last sentence.

§ 105-156. Failure to file returns; supplementary returns. — If the Commissioner of Revenue shall be of the opinion that any taxpayer has failed to file a return or to include in a return filed, either intentionally or through error, items of taxable income, he may require from such taxpayer a return or supplementary return, under oath, in such form as he shall prescribe, of all the items of income which the taxpayer received during the year for which the return is made, whether or not taxable under the provisions of this article. If from a supplementary return or otherwise the Commissioner finds any items of income, taxable under this article, have been omitted from the original return, or any items returned as taxable that are not taxable, or any item of taxable income overstated, he may require the items so omitted to be disclosed to him under oath of the taxpayer, and to be added to or deducted from the original return. Such supplementary return and the correction of the original return shall not relieve the taxpayer from any of the penalties to which he may be liable under any provision of this article. The Commissioner may proceed under the provisions of § 105-159, whether or not he requires a return or a supplementary return under this section. (1939, c. 158, s. 331.)

Collection and Enforcement of Income Tax.

§ 105-157. Time and place of payment of tax.—(1) The full amount of the tax payable, as shown on the face of the return, shall be paid to the Commissioner of Revenue at the office where the return is filed at the time fixed by law for filing the return. If the amount of the tax exceeds fifty dollars (\$50.00),

payment may be made in two equal installments: one-half on the date the return is filed, and one-half on or before September 15th, with interest on the deferred payment at the rate of four per cent (4%) per annum from March 15th until paid; provided, that if the deferred payment is not made when due, interest at the rate of six per cent (6%) per annum shall be added to such deferred payment from March 15th until paid. This provision for deferred payment shall become effective as of January 1st, 1948. If the amount of the tax exceeds four hundred dollars (\$400.00), payment may be made in four equal installments, one-fourth at the time of filing the report, one-fourth on or before June 15th, one-fourth on or before September 15th, and one-fourth on or before December 15th, with interest on the deferred payments at the rate of four per cent (4%) per annum from March 15th until paid; provided, that if any deferred payment is not made when due, the entire unpaid balance of the tax shall become immediately due and payable, and interest at the rate of six per cent (6%) per annum shall be added to such balance from March 15th until paid. This provision for deferred payments shall become effective as of January 1st, 1948.

(2) If the time for filing the return be extended, interest at the rate of four per cent(4%) per annum from the time when the return was originally required

to be filed to the time of payment shall be added and paid.

(3) The tax may be paid with uncertified check during such time and under such regulations as the Commissioner of Revenue shall prescribe; but if a check so received is not paid by the bank on which it is drawn, the taxpayer by whom such check is tendered shall remain liable for the payment of the tax and for all legal penalties the same as if such check had not been tendered. (1939, c. 158, s. 332; 1943, c. 400, s. 4; 1947, c. 501, s. 4.)

Editor's Note.—The 1947 amendment rewrote subsection (1) as changed by the 1943 amendment, which also changed the interest rate in subsection (2) from six to

four per cent.

Applied in Winston-Salem v. Powell Paving Co., 7 F. Supp. 424 (1934).

§ 105-158. Examination of returns.—1. As soon as practicable after the return is filed the Commissioner of Revenue shall examine and compute the tax, and the amount so computed by the Commissioner shall be the tax. If the tax found due shall be greater than the amount theretofore paid, the excess shall be paid to the Commissioner within thirty days after notice of the amount shall be mailed by the Commissioner, and any overpayment of tax shall be returned within thirty days after it is ascertained.

2. If the return is made in good faith and the understatement of the tax is not due to any fault of the taxpayer, there shall be no penalty or additional tax added because of such understatement, but interest shall be added to the amount of the deficiency at the rate of one-half $\binom{1}{2}$ of one per cent $\binom{1}{9}$ per month or fraction thereof from the time said return was required by law to be filed until paid.

3. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added to the amount of the deficiency five per cent (5%) thereof, and, in addition, interest at the rate of one-half $(\frac{1}{2})$ of one per cent (1%) per month or fraction thereof from time said return was

required by law to be filed until paid.

4. If the understatement is found by the Commissioner of Revenue to be false or fraudulent, with intent to evade the tax, the tax on the additional income discovered to be taxable shall be doubled and interest at the rate of one-half (½) of one per cent (1%) per month or fraction thereof from time said return was required by law to be filed until paid. The provisions of this article with respect to revision and appeal shall apply to a tax thus assessed. (1939, c. 158, s. 333.)

Cited in Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240 (1948).

8 105-159. Corrections and changes.—If the amount of the net income for any year of any taxpayer under this article, as returned to the United States treasury department, is changed and corrected by the Commissioner of Internal Revenue or other officer of the United States of competent authority, such taxpayer, within two years after receipt of internal revenue agent's report or supplemental report reflecting the corrected net income, shall make return under oath or affirmation to the Commissioner of Revenue of such corrected net income. If the taxpaver fails to notify the Commissioner of Revenue of assessment of additional tax by the Commissioner of Internal Revenue, the statute of limitations shall not apply. 'The Commissioner of Revenue shall thereupon proceed to determine, from such evidence as he may have brought to his attention or shall otherwise acquire, the correct net income of such taxpaver for the fiscal or calendar year, and if there shall be any additional tax due from such taxpayer the same shall be assessed and collected; and if there shall have been an overpayment of the tax the said Commissioner shall, within thirty days after the final determination of the net income of such taxpaver, refund the amount of such excess: Provided, that any taxpayer who fails to comply with this section as to making report of such change as made by the federal government within the time specified shall be subject to all penalties as provided in § 105-161, in case of additional tax due, and shall forfeit his rights to any refund due by reason of such change.

If a refund of taxes paid is made under this section, interest thereon at six per cent (6%) per annum computed from ninety (90) days after the overpayment was made shall be added to such refund. If an assessment is made under this section, interest thereon at six per cent (6%) per annum computed from the

due date of the original return shall be added.

When the taxpayer makes the return reflecting the corrected net income as required by this section, the Commissioner of Revenue shall make assessments or refunds based thereon within three (3) years from the date the return required by this section is filed and not thereafter. When the taxpayer does not make the return reflecting the corrected net income as required by this section but the Department of Revenue receives from the United States government or one of its agents a report reflecting such corrected net income, the Commissioner of Revenue shall make assessments for taxes due based on such corrected net income within five (5) years from the date the report from the United States government or its agent is actually received and not thereafter. (1939, c. 158, s. 334; 1947, c. 501, s. 4; 1949, c. 392, s. 3.)

Editor's Note.—The 1947 amendment substituted "two years" for "thirty days" in the first sentence of the first paragraph, and struck out the second sentence. The 1949 amendment restored the said sentence and added the second and third paragraphs.

This section imposes on the taxpayer a positive duty with respect to his income tax liability beyond that required by § 105-152, respecting his original return; it is his duty not only to report the change made by the federal department but to file another return under oath reflecting it. And the fact that three years had already elapsed after the filing of the original return before the taxpayer received notice of the change

made by the federal department did not bring into operation the statute of limitations in § 105-160 so as to relieve the tax-payer of this duty. Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240 (1948).

Procedure under Former Statute Exclusive.—The procedure prescribed by the former statute requiring that a new return be made within thirty days of the receipt of the redetermination of the taxpayer's income tax by the federal government was held exclusive and had to be followed to entitle the taxpayer to the relief therein provided. State v. Hinsdale, 207 N. C. 37, 175 S. E. 847 (1934).

§ 105-160. Additional taxes.—If the Commissioner of Revenue discovers from the examination of the return or otherwise that the income of any taxpayer, or any portion thereof, has not been assessed, he may, at any time within three years (except where the taxpayer has failed to notify the Commissioner of additional assessment by the federal department—see § 105-159)

after the time when the return was due, give notice in writing to the taxpaver of such deficiency. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the Commissioner of Revenue, if within thirty days after giving notice of such proposed assessment he shall apply for such hearing in writing, explaining in detail his objections to same. If no request for such hearing is so made, such proposed assessment shall be final and conclusive. If the request for hearing is made, the taxpayer shall be heard by the Commissioner of Revenue, and after such hearing the Commissioner of Revenue shall render his decision. The taxpayer shall be advised of his decision and such amount shall be due within ten days after notice is given. The provisions of this article with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or an additional tax shall not apply to the assessment of additional taxes upon fraudulent returns. Upon failure to file returns and in the absence of fraud the limitation shall be five years. (1939, c. 158, s. 335; 1947, c. 501, s. 4; 1949, c. 392, s. 3.)

Editor's Note.—The 1947 amendment inserted after the word "returns" in the last sentence the phrase "(including the notice or return required by G. S. § 105-159 with respect to federal correction of net income)." But the 1949 amendment struck out the quoted phrase.

As to former statute, see 12 N. C. Law Rev. 21.

Three-Year Provision Is Not Strictly a Statute of Limitation.—The three-year limitation from the time of filing original income tax returns during which the Commissioner of Revenue may review returns and make additional assessments is not strictly a statute of limitations and does not affect the right to additional tax, but applies solely to administrative procedure by which the tax is assessed. Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240 (1948).

Failure to File Additional Return under

§ 105-159.—This section, considered in pari materia with the other pertinent provisions of the Revenue Act, does not preclude the Commissioner of Revenue from making additional assessments or refunds of income taxes after the expiration of three years from the filing of the original returns. where the taxpayer has been required to make changes in his federal income tax return and pay an additional assessment of federal income taxes, and has failed to notify the Commissioner of Revenue of such changes and to file an additional return under oath as required by § 105-159, notwithstanding that three years had already elapsed after the filing of the original return before the taxpayer received notice of the change made by the federal department. Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240 (1948). See § 105-159 and note.

§ 105-161. Penalties.—1. If any taxpayer, without intent to evade any tax imposed by this article, shall fail to file a return of income and pay the tax, if one is due, at the time required by or under the provisions of this article, but shall voluntarily file a correct return of income and pay the tax due within sixty days thereafter, there shall be added to the tax an additional amount equal to five per cent thereof, but such additional amount shall in no case be less than one dollar and interest at the rate of one-half of one per cent $(\frac{1}{2}\%)$ per month or fraction thereof from the time said return was required by law to be filed until paid.

2. If any taxpayer fails voluntarily to file a return of income or pay the tax, if one is due, within sixty days of the time required by or under the provisions of this article, there shall be added to the tax an additional amount equal to twenty-five per cent (25%) thereof and interest at the rate of one-half of one per cent $(\sqrt{2}\%)$ per month or fraction thereof, from the time such return was required to be filed until paid, but the penalty shall not be less than five dollars (\$5.00).

3. If any taxpayer fails to file a return within sixty days of the time prescribed by this article, any judge of the superior court, upon petition of the Commissioner of Revenue or of any ten taxable residents of the State, shall issue a writ of mandamus requiring such person to file a return. The order of notice upon the petition shall be returnable not later than ten days after the filing of the

petition. The petition shall be heard and determined on the return day or such day thereafter as the court shall fix, having regard to the speediest possible determination of the case consistent with the rights of the parties. The judgment shall include costs in favor of the prevailing party. All writs and processes may be issued from the clerk's offices in any county, and, except as aforesaid, shall be returnable as the court shall order.

4. The failure to do any act required by or under the provisions of this article shall be deemed an act committed in part at the office of the Commissioner of Revenue in Raleigh. The certificate of the Commissioner of Revenue to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied, as required by or under the provisions of this article, shall be prima facie evidence that such tax has not been paid, that such return has not been filed, or that such information has not been supplied.

5. If any taxpayer who has failed to file a return or has filed an incorrect or insufficient return, and has been notified by the Commissioner of Revenue of his delinquency, refuses or neglects within twenty days after such notice to file a proper return, or files a fraudulent return, the Commissioner shall determine the income of such taxpayer, according to his best information and belief, and assess the same at not more than double the amount so determined. The Commissioner may, in his discretion, allow further time for the filing of a return in such case.

6. Any person required under this article to pay any tax or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information for the purposes of computation, assessment or collection of any tax imposed by this article, who willfully fails to pay this tax, make such return, keep such records or supply such information at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than five hundred dollars (\$500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment at the discretion of the court, within the limitations aforesaid. (1939, c. 158, s. 336.)

Revision and Appeal.

§ 105-162. Revision by Commissioner of Revenue.—A taxpayer may apply to the Commissioner of Revenue for revision of the tax assessed against him at any time within three years from the time of the filing of the return or from the date of the notice of assessment of any additional tax. The Commissioner shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the facts, and adjust the computation of tax accordingly. The Commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due. (1939, c. 158, s. 340.)

Revision Barred by Lapse of Time.—Where a taxpayer failed to apply to the Commissioner of Revenue for a revision within three years from the filing of its return, its claim was barred, under a former statute identical with this section, and the fact that the application for a revision was made within three years of redetermination of income tax by the federal government,

did not avail the taxpayer where he did not make a new return within thirty days after such redetermination by the federal government, as provided by the former statute corresponding to § 105-159, since the limitation prescribed by the instant section is explicit and unequivocal. State v. Hinsdale, 207 N. C. 37, 175 S. E. 847 (1934).

§ 105-163. Appeal.—Any taxpayer may file formal exceptions to a finding by the Commissioner of Revenue, under the provisions of this article with respect to his taxable income, either to a matter of fact or law, as far as possible

stating such exceptions separately. After they are filed, the Commissioner shall pass upon the same formally, and notify the taxpayer immediately of his findings upon these exceptions. The taxpayer may, within ten days after notification of the Commissioner's ruling upon these exceptions, appeal to the superior court of Wake County, upon paying the tax assessed by the Commissioner and giving a bond for costs in the sum of two hundred dollars (\$200.00): Provided, the taxpayer may within the above prescribed time first appeal to the State Board of Assessment on the exceptions to the findings of the Commissioner; and provided further, that the Commissioner may in his discretion require a surety bond or a deposit of State or government bonds in double the amount of the alleged deficiency. Appeal may then be taken by either the taxpayer or the Commissioner to the superior court of Wake County as provided herein. Upon receipts of such notice and the taxes paid, and the filing of the cost bond in the sum of two hundred dollars (\$200.00), the Commissioner shall certify the record to the superior court of Wake County. In the superior court the proceedings shall be as follows:

The cause shall be entitled, "State of North Carolina on Relation of the Commissioner of Revenue vs. Appellant" (giving name). If there are exceptions to facts found by the Commissioner, it shall be placed on the civil issue docket of such court and shall have precedence over other civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of such civil actions, except that the findings of the Commissioner shall be prima facie correct. If only issues of law, or if issues of fact are raised, and the appellant shall waive jury trial at the time of taking the appeal, the appeal may be had to the superior court of the county in which the appellant resides, and the cause shall be heard by the judge holding court in the judicial district in which the appeal is docketed, at chambers, upon ten days' notice to the parties of the time and place of hearing, and the said judge shall pass upon and determine all issues, both of law and fact, the State hereby waiving in such cases a trial by jury. Either party may appeal to the Supreme Court from the judgment of the superior court under the rules and regulations prescribed by law for appeals, except that the State, if it should appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal, and the Supreme Court may advance the cause on its docket so as to give the same a speedy hearing. Any taxes, interest, or penalties paid, found by the court to be in excess of those which can be legally assessed, shall be ordered refunded to the taxpayer, with interest from the time of payment. (1939, c. 158, s. 341.)

ARTICLE 5.

Schedule E. Sales Tax.

§ 105-164. Short title.—This article shall be known and may be cited as the sales tax article of the Revenue Act. (1939, c. 158, s. 400.)

§ 105-165. Purpose.—The taxes levied in this article are to provide revenue for the support of the public schools of the State in substitution for the taxes formerly levied on property for this purpose. They are levied for the biennium of fiscal years beginning July first, one thousand nine hundred thirtynine, and ending June thirtieth, one thousand nine hundred forty-one, and thereafter until otherwise provided by law.

The tax upon the sale of tangible personal property in this State is levied as a license or privilege tax for engaging or continuing in the business of a "wholesale" or "retail" merchant as defined in this article. Retail merchants may add to the price of merchandise the amount of the tax on the sale thereof, and when so added shall constitute a part of such price, shall be a debt from purchaser to merchant until paid, and shall be recoverable at law in the same manner as other debts. It is the purpose and intent of this article that the tax levied herein on

retail sales shall be added to the sales price of merchandise and thereby be passed on to the consumer instead of being absorbed by the merchant.

Any retail merchant who shall, by any character of public advertisement, offer to absorb the tax levied in this article upon the retail sale of merchandise, or in any manner, directly or indirectly, advertise that the tax herein imposed is not considered as an element in the price to the consumer, shall be guilty of a misdemeanor. Any violations of the provisions of this section reported to the Commissioner of Revenue shall be reported by the Commissioner of Revenue to the Attorney General of the State, to the end that such violations may be brought to the attention of the solicitor of the court of the county or district whose duty it is to prosecute misdemeanors in the jurisdiction. It shall be the duty of such solicitor to investigate such alleged violations and if he finds that this section has been violated to prosecute such violations. The provisions of this section are deemed necessary to prevent fraud and unfair practices, but it is the intent of the General Assembly that if one or both of such provisions be held unconstitutional and void, that such invalid provision or provisions be considered separable and that the balance of this article be given effect. (1939, c. 158, s. 401.)

§ 105-166. Contingency.—If the Congress of the United States shall, at any time hereafter, enact any form of sales or production tax distributable in whole or in part to the several states, the Governor and Council of State shall estimate the proportion of such tax distributable to this State, and shall, by proclamation of the Governor, abate a uniform percentage of all the taxes levied in this article equal in estimated revenue yield to the estimated proportion of yield of such federal tax, and from and after the effective date of such proclamation the Commissioner of Revenue shall enforce and collect only the remaining percentage of taxes levied in this article. (1939, c. 158, s. 402.)

§ 105-167. Definitions.—For the purposes of this article:

1. The word "person" shall mean any person, firm, partnership, association, corporation, estate or trust.

2. The word "Commissioner" shall mean the Commissioner of Revenue of the State of North Carolina.

3. The word "merchant" shall include any individual, firm, corporation, domestic or foreign, estate or trust, subject to the tax imposed by this article.

4. The words "wholesale merchant" shall mean every person who engages in the business of buying any article of commerce and selling same to merchants for resale. For the purposes of this article any person, firm, corporation, estate or trust engaged in the business of manufacturing, producing, processing or blending any articles of commerce and maintaining a store or stores, warehouse or warehouses, or any other place or places, separate and apart from the place of manufacture or production, for the sale or distribution of its products to other manufacturers or producers, wholesale or retail merchants, for the purpose of resale shall be deemed a "wholesale merchant."

5. The words "wholesale sale" or "sale at wholesale" shall mean a sale of tangible personal property by a wholesale merchant to a manufacturer, jobber or dealer, wholesale or retail merchant, for the purpose of resale, but does not include a sale to users or consumers not for resale. The term "wholesale sale" shall include a sale of tangible personal property to a manufacturer which enters into or becomes an ingredient or component part of the tangible personal property which

is manufactured.

6. The words "retail merchant" shall mean every person who engages in the business of buying or acquiring, by consignment or otherwise, any articles of commerce and selling same at retail.

7. The word "retail" shall mean the sale of any articles of commerce in any

quantity or quantities for any use or purpose on the part of the purchaser other than for resale.

8. The word "sale" or "selling" shall mean any transfer of title or possession, or both, exchange, or barter of tangible personal property, conditional or otherwise, however effected and by whatever name called, for a consideration paid or to be paid, in installments or otherwise, and shall include any of said transactions whereby title or ownership is ultimately to pass notwithstanding the retention of title or possession, or both, for security or other purposes, and shall further mean and include any bailment, loan, lease, rental or license to use or consume tangible personal property for a consideration paid or to be paid, in installments or otherwise, in which possession of said property passes to the bailee, borrower, lessee, or licensee: Provided, the provisions of this subsection shall not apply to the lease or rental of motion picture films used for exhibition purposes and for which a license tax is imposed under the provisions of § 105-37.

9. The words "gross sales" shall mean the gross sales price at which such sales were made, whether for cash or on time, and if on time, the price charged on the books for such sales, without allowance for cash discount, and shall be reported as sales with reference to the time of delivery to the purchaser, except as this provision is modified by § 105-171. (1939, c. 158, s. 404; 1941, c. 50, s. 6; 1945,

c. 708, s. 5.)

Editor's Note. — The 1941 amendment changed subsection 8,

The 1945 amendment inserted immediately before the proviso in subsection 8 the words "in which possession of said property passes to the bailee, borrower, lessee, or licensee." And the amendment substituted the latter part of the proviso for the words "tax of three per cent is paid on the total admissions for such exhibitions."

For comment on the 1941 amendment, see 19 N. C. Law Rev. 536. For analysis of provisions of former law, see 11 N. C.

Law Rev. 420. For decisions under former laws, see Powell v. Maxwell, 210 N. C. 211, 186 S. E. 326 (1936); McCanless Motor Co. v. Maxwell, 210 N. C. 725, 188 S. E. 389 (1936); Leonard v. Maxwell, 216 N. C. 89, 2 S. E. (2d) 316 (1939).

Construction of Article.—As to the incidence of the sales tax where it is imposed upon a general class, as for instance retail merchants, the law is construed more strictly against the agency imposing the tax, and in favor of the taxpayer. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948).

105-168. Licenses; wholesale and retail sales tax rates; use tax on motor vehicles.—If any person, after the thirtieth day of June, one thousand nine hundred thirty-nine, shall engage or continue in any business for which a privilege tax is imposed by this article, such person shall apply for and obtain from the Commissioner, upon the payment of the sum of one dollar (\$1.00), a license to engage in and conduct such business upon the condition that such person shall pay the tax accruing to the State of North Carolina under the provisions of this article; and he shall thereby be duly licensed to engage in and conduct such business. The license tax levied in this section shall be a continuing license until revoked for failure to comply with the provisions of this article. cense issued under article V, chapter four hundred forty-five, Public Laws of one thousand nine hundred thirty-three, for the year one thousand nine hundred thirty-four—one thousand nine hundred thirty-five; under chapter three hundred seventy-one, Public Laws of one thousand nine hundred thirty-five, for the biennium one thousand nine hundred thirty-five—one thousand nine hundred thirtyseven, and chapter one hundred twenty-seven, Public Laws of one thousand nine hundred thirty-seven, for the biennium one thousand nine hundred thirty-seven one thousand nine hundred thirty-nine, shall be deemed a continuing license under this section.

An additional tax is hereby levied for the privilege of engaging or continuing

in the business of selling tangible personal property, as follows:

(a) Wholesale Merchants.—Upon every wholesale merchant as defined in this article, an annual license tax of ten dollars (\$10.00). Such annual license shall

be paid in advance within the first fifteen days of July in each year or, in the case of a new business, within fifteen days after business is commenced. There is also levied on each wholesale merchant an additional tax of one-twentieth of one per cent (1/20th of 1%) of the total gross sales of the business.

The sale of any article of merchandise by any "wholesale merchant" to anyone other than to a licensed retail merchant for resale shall be taxable at the rate of tax provided in this article upon the retail sale of merchandise. In the interpretation of this article the sale of any articles of commerce by any "wholesale merchant" to anyone not taxable under this article as a "retail merchant," except as otherwise provided in this article, shall be taxable by the wholesale merchant at the rate of tax provided in this article upon the retail sale of merchandise. The Commissioner of Revenue is authorized to make appropriate regulations, consistent with this article, to prevent abuse with respect to existing regulations defining transactions entitled to the rate of tax levied on sales at wholesale.

(b) Retail Merchants.—Upon every retail merchant, as defined in this article, a tax of three per cent (3%) of the total gross sales of the business of every such retail merchant: Provided, however, the maximum tax that shall be imposed upon the sale of any single article of merchandise shall be fifteen dollars (\$15.00).

(c) Motor Vehicles.—In addition to the taxes levied in this article or in any other law, there is hereby levied and imposed upon every person, for the privilege of using the streets and highways of this State, a tax of three per cent (3%) of the sales or purchase price of any new or used motor vehicle purchased or acquired for use on the streets and highways of this State requiring registration thereof under the Motor Vehicle Laws of this State, which said amount shall not exceed fifteen dollars (\$15.00), and shall be paid to the Commissioner of Revenue at the time of applying for certificate of title or registration of such motor vehicle. No certificate of title or registration plate shall be issued for same unless and until said tax has been paid: Provided, however, if such person so applying for certificate of title or registration and license plate for such motor vehicle shall furnish to the Commissioner of Revenue a certificate from a motor vehicle dealer licensed to do business in this State, upon a form furnished by the Commissioner, certifying that such person has paid the tax thereon levied in this article, the tax herein levied shall be remitted to such person to avoid in effect double taxation on said motor vehicle under this article. The term "motor vehicle" as used in this section shall include trailers. It is declared to have been the purpose of this subsection that whenever a motor vehicle chassis is or has been purchased separately from the body which is thereafter installed thereon, the maximum tax herein levied shall be imposed only on the sale of the chassis and no additional tax shall be imposed upon the body mounted upon the same. It is not the intention of this section to impose any tax upon a body mounted upon the chassis of a motor vehicle which temporarily enters the State for the purpose of having such body mounted thereon by the manufacturer thereof. The Commissioner of Revenue is authorized to cancel any taxes assessed contrary to the provisions hereof.

The tax levied under this subsection shall not apply to the owner of a motor vehicle who purchases or acquires said motor vehicle from some person, firm or corporation who or which is not a dealer in new and/or used motor vehicles if the tax levied under this subsection, this article, or article 8 has been paid with respect to said motor vehicle. (1939, c. 158, s. 405; 1943, c. 400, s. 5; 1947, c. 501, s. 5.)

Editor's Note.—The 1943 amendment added the last three sentences of the first paragraph of subsection (c).

The 1947 amendment added the second

paragraph of subsection (c).

Merchants are statutory agents for the collection of the tax on sales, which is definitely imposed upon the consumer, and

their responsibility arises on the assumption that they must so collect. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948).

Erroneous Advice of Agent of Department of Revenue.—The State is not estopped to collect the retail sales tax levied by this section by the action of an agent of

the Department of Revenue in erroneously advising the merchant that certain sales were not subject to the tax, notwithstanding that the merchant was thereby deprived of the opportunity to collect the tax from

his customers. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948).

Cited in Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. 275 (1940).

§ 105-169. Exemptions. — The taxes imposed in this article shall not

apply to the following:

(a) Sales by manufacturers or producers of their own manufactured products when sold to other manufacturers, producers, wholesale or retail merchants, for the purpose of resale except as this subsection is limited and modified by subsections four and five of § 105-167. The exemption in this subsection shall not extend to or include sales by manufacturers or producers of their own manufactured products when sold to users or consumers and not for the purpose of resale.

(b) Sales of gasoline or other motor fuel on which the tax levied in § 105-434 and/or § 105-435 is due and has been paid, and the fact that a refund of the tax levied by either of said sections is made pursuant to the provisions of subchapter V of chapter 105 shall not make the sale or the seller of such fuels subject to the

tax levied by this article.

(b1) Sales of fuels to farmers to be used by them for any farm purpose other

than preparing food, heating dwellings, and other household purposes.

(c) Sale of commercial fertilizer on which the inspection tax is paid, and lime and land plaster used for agricultural purposes whether the inspection tax is paid or not.

(c1) Sales of semen to be used in the artificial insemination of animals.

(d) Sales made to the State of North Carolina or any of its subdivisions, including sales of merchandise and articles of commerce to agencies of State or local governments for distribution in public welfare or relief work. This exemption shall not apply to sales made to organizations, corporations, and institutions that are not governmental agencies, owned and controlled by the State or local governments. Sales of building material made directly to State and local governments in this State shall be exempt from the tax on building material levied in this article, and sales of building material to contractors to be used in construction work for State or local governments shall be construed as direct sales.

Where any person, firm or corporation has entered into a contract with the federal, State, or local governments, or any agency thereof, or with any private person, firm or corporation, or other party whatsoever, to manufacture or fabricate tangible personal property including ships, boats, aircraft, equipment, ordnance, or any other products or articles of commerce, for cost or for cost plus a fixed fee, sales to such manufacturer or fabricator of materials which shall enter into and become an ingredient or component part of the product manufactured or

fabricated shall not be subject to retail sales tax or use tax.

(e) The gross receipts from sales of tangible personal property which the State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

(f) Accounts of purchasers, representing taxable sales, on which the tax imposed by this article has been paid, that are found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross sales in so far as they represent taxable sales made after July first, one thousand nine hundred thirty-three, and to be added to gross sales if afterwards collected.

(g) Sales of public school books on the adopted list and the selling price of

which is fixed by State contract, and Holy Bibles.

(h) Sales of used articles taken in trade, or a series of trades, as a credit or part payment on the sale of a new article, provided the tax levied in this article is paid on the full gross sales of the new article. In the interpretation of this subsection, new article shall be taken to mean the original stock in trade of the mer-

chant, and shall not be limited to newly manufactured articles. The resale of articles repossessed by the vendor shall likewise be exempt from gross sales taxable under this article.

- (i) Conditional exemptions; sales by retail merchants of food and food products for human consumption.—The term "food and food products for human consumption" shall be given its usual and ordinary meaning, but shall not include malt or vinous beverages, soft or carbonated drinks, sodas, or beverages such as are ordinarily sold or dispensed at stores, bars, stands or soda fountains or in connection therewith, candies or confectioneries, medicines, tonics, and preparations in liquid, powdered, granular, tablet, capsule, or pill form sold as dietary supplements; nor does "food and food products for human consumption" include prepared meals or foods sold or served on or off the premises by restaurants, cafes, cafeterias, hotel dining rooms, drug stores, or other places where prepared meals or foods are sold or served.
- (j) Sales of ice, whether sold by the manufacturer, producer, wholesale or retail merchants.
- (k) Sales of medicines sold on prescriptions of physicians, or medicines compounded, processed or blended by the druggist offering the same for sale at retail or sales of drugs or medical supplies to physicians or hospitals or by physicians and hospitals to patients in connection with medical treatments.

(1) Sales of products of farms, forests, mines, and waters when such sales are made by the producers in their original or manufactured state. Fish and sea foods shall be likewise exempt when sold by the fishermen.

(m) For the purposes of this article, sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants may be classified as wholesale sales and, therefore, only subject to the wholesale rate of tax.

(n) Sales of horses and/or mules.

(o) Sales of coffins or caskets which do not sell for more than one hundred dollars (\$100.00).

(p) Sales of cotton, tobacco, peanuts and other farm products sold to manu-

facturers for further manufacturing or processing.

(q) Sales of tangible personal property to hospitals not operated for profit, churches, orphanages, and other charitable or religious institutions or organizations not operated for profit, and educational institutions not operated for profit, when such tangible personal property is purchased for use in carrying on the work of such institutions or organizations. Sales of building materials to contractors to be used in construction and repair work for the institutions and agencies described in this subsection shall be construed as sales to said institutions or agencies for the purposes of this subsection.

(r) Sales of crutches, and sales of artificial limbs, artificial eyes, artificial hearing devices, when the same are designed to be worn on the person of the owner or

user, and sales of orthopedic appliances.

(s) Sales of seeds, feeds for livestock and poultry, and insecticides for live-

stock, poultry and agriculture.

(t) Sales of lubricants, repair parts and accessories for motor vehicles and airplanes, when made to the owner and operator of fleets of five or more motor vehicles or airplanes to be used in or upon such motor vehicles or airplanes, shall be classified as wholesale sales, and, therefore, only subject to the wholesale rate of tax.

Every merchant selling merchandise to other merchants for resale shall deliver to the customer a bill of sale for each sale of merchandise, whether sold for cash or on credit, and shall make and retain a duplicate or carbon copy of each such bill of sale, and shall keep a file of all such duplicate bills of sale for at least three years from date of sale, or until inspected and audited by a representative of the Department of Revenue. Failure to comply with the provisions of this paragraph shall subject the seller to liability for tax upon such sales at the rate of tax levied in this article upon retail sales.

Unless records are kept in such manner as will accurately disclose separate accounting of sales of taxable and nontaxable merchandise and in such form as may be accurately and conveniently checked by the representative of the Department of Revenue, the exemptions herein made shall not be allowed, and it shall be the duty of the Commissioner or his agents to assess a tax upon the total gross sales at the rate of tax levied upon retail sales, and if records are not kept showing total gross sales, it shall be the duty of the Commissioner or his agents to assess a tax upon an estimation of sales upon the best information obtainable. (1939, c. 158, s. 406; 1941, c. 50, s. 6; 1943, c. 400, s. 5; 1945, c. 708, s. 5; 1947, c. 501, s. 5; 1949, c. 392, s. 4; c. 1271.)

Editor's Note. — The 1941 amendment added the words "and Holy Bibles" at the end of subsection (g), changed subsection (i) and inserted former subsection (p), relating to sales to trustees of churches, and former subsection (q), relating to sales of cotton, etc.

The 1943 amendment struck out references to the federal government in the third sentence of subsection (d) and added the second paragraph thereof. The amendment also struck out former subsection (p) relating to sales to trustees of churches, changed former subsection (q) to (p) and inserted subsections (q) and (r).

The 1945 amendment made subsection (k) applicable to sales of drugs or medical supplies to physicians, etc., and added subsections (s) and (t).

The 1947 amendment rewrote subsections (b) and (t) and substituted in subsection (q) the words "not operated for profit" for the words "principally supported by the State of North Carolina,"

The first 1949 amendment rewrote subsection (b), inserted subsection (b1) and added the second sentence of subsection (q). The second 1949 amendment inserted

subsection (c1). For brief comment on the 1949 amendments, see 27 N. C. Law Rev. 484

Burden of Proof.—Where the tax coverage is challenged by virtue of an exemption or exception, the burden is upon the challenger to bring himself within the exemption or exception. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948).

Flowers grown upon the vendors' own land are farm products within the meaning of the exemption of such products from the sales tax. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948).

Sale by Florist of Flowers Grown on Own Land. — Plaintiffs operated a florist shop and sold therein flowers grown by themselves on their own land and also flowers purchased from wholesalers. It was held that the sale of flowers grown by them on their own land was not exempt from the sales tax, since even though such flowers are regarded as farm products, such sales were made by plaintiffs in their character and capacity of florists and not as farmers or producers. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948).

§ 105-170. Taxes payable; failure to make return; duty and power of Commissioner. — The taxes levied in this article shall be due and payable in monthly installments on or before the fifteenth day of the month next succeeding the month in which the tax accrues. Every taxpayer liable for the tax imposed by this article shall, on or before the fifteenth day of the month, make out or prepare a return on the blank report form furnished by the Commissioner of Revenue, showing the total gross sales, the sales exempted from the tax, the net taxable sales, the amount of tax covering sales in the preceding month, and shall mail same, together with the remittance for the amount of the tax, to the Commissioner. Such monthly return shall be signed by the taxpayer or a duly authorized agent of the taxpayer. Every taxpayer who pays the tax imposed by this article and Article 8, Schedule I, shall be entitled to deduct from the amount of the tax for which he is liable and which he actually pays, a discount of three per cent (3%): Provided, however, the Commissioner may deny a taxpayer the benefits of this subsection for failure to pay the full tax when due, as well as in cases of fraud, evasion, and failure to keep accurate and clear records as provided in § 105-169: Provided, further, that in order to secure the benefits of this subsection, the taxpayer must deduct the three per cent (3%) discount at the time of making his monthly remittance of tax to the Department of Revenue.

(a) Delayed Returns.—If a delinquent return or a return without remittance

for the amount of tax shown to be due is received by the Commissioner or his duly authorized agents, the taxpayer shall be assessed with a five per centum penalty plus interest at one-half of one per centum per month from the date the tax was due. The penalty provided in this subsection shall not be less than one dollar

(\$1.00).

(b) Failure to Make Returns.—If the taxpayer shall fail to make or refuse to make the returns required under this article, then such returns shall be made by the Commissioner or his duly authorized agents from the best information available, and such returns shall be prima facie correct for the purposes of this article, and the amount of tax due thereby shall be a lien against all the property of the taxpayer until discharged by payments, and if payment not be made within thirty days after demand therefor by the Commissioner or his duly authorized agents, there shall be added not more than one hundred per centum as damages, together with interest at the rate of one per centum per month from the time such tax was due. If such tax be paid within thirty days after notice by the Commissioner, then there shall be added not more than ten per centum as damages, and interest at the rate of one per centum per month from the time such tax was due until paid.

(c) Not to Issue Certificate of Title or License.—As an additional means of enforcement of the payment of the tax herein levied the Department of Motor Vehicles shall not issue a certificate of title or a license plate for any new or used motor vehicle sold by any merchant or dealer licensed to do business in this State until the tax levied for the sale of same in this article has been paid, or a certificate, duly signed by a dealer licensed to do business in this State, is filed at the time the application for title or license plate is made for such motor vehicle; such certificate to be on such form as may be prescribed by the Commissioner of Motor Vehicles, and such certificate shall show that the said licensed dealer has assumed the responsibility for the payment of the tax levied under this article and agrees to report and remit the tax in his next regular monthly sales tax report required to be filed under this article. (1939, c. 158, s. 407; 1943, c. 400, s. 5; 1947, c. 501, s. 5.)

Editor's Note. — The 1943 amendment added the last sentence and provisos to the first paragraph.

The 1947 amendment substituted "De-

partment of Motor Vehicles" for "Department of Revenue" and "Commissioner of Motor Vehicles" for "Commissioner of Revenue" in subsection (c).

- § 105-171. Credit sales.—Any person taxable under this article having cash and credit sales may report such cash and credit sales separately, and upon making application therefor may obtain from the Commissioner an extension of time for the payment of taxes due on such credit sales. Such extension shall be granted under such rules and regulations as the Commissioner may prescribe. When such extension is granted, the taxpayer shall thereafter include in each monthly report all collections made during the month next preceding and shall pay taxes due thereon at the time of filing such report. (1939, c. 158, s. 408.)
- § 105-172. Forms for making returns.—The monthly returns required under this article shall be made upon forms to be prescribed and provided by the Commissioner. (1939, c. 158, s. 411.)
- § 105-173. Extension of time for making returns.—The Commissioner for good cause may extend the time for making any return required under the provisions of this article, and may grant such additional time within which to make such return as he may deem proper, but the time for filing any such return shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such return. If the time for filing a return be extended, interest at the rate of one-half of one per centum per month from the time the return was required to be filed to the time of payment shall be added and paid. (1939, c. 158, s. 412.)
 - § 105-174. Commissioner to correct error.—As soon as practicable

after the return is filed the Commissioner shall examine it; if it then appears that the correct amount of tax is greater or less than that shown in the return, the tax shall be recomputed.

Excessive Payments.—If the amount already paid exceeds that which should have been paid, on the basis of the tax so recomputed, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of this article.

Deficiency of Amount.—(a) If the amount already paid is less than the amount which should have been paid, the difference to the extent not covered by any credits under this article, together with interest thereon at the rate of one-half of one per centum per month from the time the tax was due, shall be paid upon notice and

demand by the Commissioner.

(b) If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations, with knowledge thereof, but without intent to defraud, there shall be added as damages ten per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of one per centum per month of the amount of such deficiency in the tax from the time it was due, which interest and damages shall become due and payable upon notice and demand by the Commissioner; provided, however, in the absence of fraud, no assessment authorized by this article shall extend to sales made more than three (3) years prior to the date of assessment; and in cases where an audit shall have been made under the direction of the Commissioner of Revenue any assessment in respect to such audit shall be made within one year after the completion of the audit: Provided, further, that when the returns required under this article have not been filed, the Commissioner of Revenue shall proceed to determine the total amount of the tax due because of sales made not more than five (5) years prior to such determination, and any assessment made as a result of such determination shall extend to and include sales made within such period.

(c) If any part of the deficiency is due to fraud with intent to evade the tax, then there shall be added as damages not more than one hundred per centum of the total amount of the deficiency in the tax, and in such case the whole amount of tax unpaid, including charges so added, shall become due and payable upon notice and demand by the Commissioner, and an additional one per centum per month on the tax shall be added from the date such tax was due until paid.

(d) If the amount already paid is less than the amount which should have been paid, the Commissioner or his duly authorized agent shall notify the taxpayer of the balance due, plus such interest and damages as are set forth in (a), (b), and (c) just preceding, and if this total amount is not paid or no appeal is taken within thirty days from the date of notice, such action shall be considered as a refusal on the part of the taxpayer to make a return, and the taxpayer shall be subject to such penalties or provisions as are provided in this article for failure to make a return.

If any taxpayer, subject to the provisions of this article, goes into bankruptcy, receivership, or turns over his stock of merchandise by voluntary transfer to creditors, the tax liability under this article shall constitute a prior lien on such stock of merchandise, subject to execution, and it shall be the duty of the transferee in any such case to retain the amount of the tax due from the first sales from such stock of merchandise and to pay the same to the Commissioner of Revenue. (1939, c. 158, s. 414; 1941, c. 50, s. 6; 1947, c. 501, s. 5.)

Editor's Note. — The 1941 amendment and the 1947 amendment added the second added the first proviso to subsection (b) proviso thereto.

§ 105-175. Taxpayer must keep records.—It shall be the duty of every person engaging or continuing in this State in any business for which a privilege tax is imposed by this article to keep and preserve suitable records of the gross income, gross receipts and/or gross receipts of sales of such business, and such other books or accounts as may be necessary to determine the amount of tax for which he is liable under the provisions of this article. And it shall be the duty of every

such person to keep and preserve, for a period of three years, all invoices of goods and merchandise purchased for resale, and all such books, invoices, and other records shall be open for examination at any time by the Commission or his duly authorized agent. (1939, c. 158, s. 415.)

- § 105-176. Tax shall be lien.—The tax imposed by this article shall be a lien upon the stock of goods and/or any other property of any person subject to the provisions hereof who shall sell out his business or stock of goods, or shall quit business, and such person shall be required to make out the return provided for under § 105-170 within thirty days after the date he sold out his business or stock of goods, or quit business, and his successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the Commissioner showing that the taxes have been paid, or a certificate that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, and the taxes shall be due and unpaid after the thirty-day period allowed, he shall be personally liable for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner. (1939, c. 158, s. 416.)
- 105-177. Aggrieved person may file petition.—If any person having made the return and paid the tax as provided by this article feels aggrieved by the assessment made upon him by the Commissioner, or, in the absence of a report, if an assessment has been made by the Commissioner under the provisions of this article, the taxpayer may apply to the Commissioner by petition, in writing, within thirty days after the notice is mailed to him, for a hearing and a correction of the amount of the tax so assessed upon him by the Commissioner, in which petition he shall set forth the reasons why such hearing should be granted and the amount in which such tax should be reduced. The Commissioner shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the petitioner shall be forthwith notified thereof; if granted, the Commissioner shall notify the petitioner of the time and place fixed for such hearing. After such hearing the Commissioner may make such order in the matter as may appear to him just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the Commissioner, and the superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected. In any suit to recover taxes paid or to collect taxes, the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

Either party to such suit shall have the right to appeal to the Supreme Court of North Carolina as now provided by law. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the State Auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the State Treasurer in favor of such taxpayer to pay such judgment, interest, and costs. It shall be the duty of the State Treasurer to honor such warrant and pay such judgment out of any funds in the State treasury.

No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this article, or to restrain the enforcement of this article. (1939, c. 158, s. 417.)

§ 105-178. Warrant for collection of tax; tax shall constitute debt due State.—If any tax imposed or any portion of such tax be not paid within thirty days after the same becomes due, the Commissioner shall proceed to enforce the payment of such tax in the manner provided by § 105-242. (1939, c. 158, s. 418; c. 370, s. 1.)

§ 105-179. Additional tax; remittances made to Commissioner; records. - The tax imposed by this article shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this article otherwise specifically provided. But no county, municipality, or district shall be authorized to levy any tax by virtue of the provisions of this article.

Remittances, How Made.—All remittances of taxes imposed by this article shall be made to the Commissioner by bank draft, check, cashier's check, money order, or money, who shall issue his receipts therefor to the taxpayers, when requested, and shall deposit daily all monies received to the credit of the State Treasurer as required by law for other taxes: Provided, no payment other than cash shall be final discharge of liability for the tax herein assessed and levied unless and until it has been paid in cash to the Commissioner.

The Commissioner shall keep full and accurate records of all monies received by him, and how disbursed; and shall preserve all returns filed with him under

this article for a period of three years. (1939, c. 158, s. 420.)

§ 105-180. Letters in report not to be divulged. — Unless in accordance with the judicial order or as herein provided, the State Department of Revenue, its agents, clerks or stenographers, shall not divulge the gross income, gross proceeds of sales, or the amount of tax paid by any person as shown by the reports filed under the provisions of this article except to members and employees of the State Department of Revenue for the purpose of checking, comparing, and correcting returns, or to the Governor, or to the Attorney General, or any other legal representative of the State in any action in respect to the amount of tax due under the provisions of this article. (1939, c. 158, s. 421; 1941, c. 50, s. 6.)

Editor's Note. - The 1941 amendment dissolution of corporation until payment of struck out the former provision of the section relating to withholding certificate of

tax levied under this article.

- § 105-181. Unlawful to refuse to make returns; penalty.—It shall be unlawful for any person to fail or refuse to make the return provided to be made in this article, or to make any false or fraudulent return or false statement in any return of the tax, or any part thereof, imposed by this article; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof, imposed by this article; or for the president, vice-president, secretary or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required by this article, with the intent to evade the payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the Commissioner or his duly appointed agent, as required by this article, or to fail or refuse to permit the inspection or appraisal of any property by the Commissioner or his duly appointed agent, or to refuse to offer testimony or produce any record as required in this article. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than five hundred dollars (\$500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment, at the discretion of the court within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent statement, with the intent aforesaid, shall be guilty of the offense of perjury, and, on conviction thereof, shall be punished in the manner provided by law. Any company for which a false return or a return containing a false statement shall be made as aforesaid, shall be guilty of a misdemeanor, and may be punished by a fine of not more than one thousand dollars (\$1,000.00). (1939, c. 158, s. 422.)
- § 105-182. Commissioner to make regulations.—The Commissioner shall from time to time promulgate such rules and regulations not inconsistent

with this article for making returns and for the ascertainment, assessment, and collection of the tax imposed hereunder as he may deem necessary to enforce its provisions, and upon request shall furnish any taxpayer with a copy of such rules and regulations. (1939, c. 158, s. 423.)

- § 105-183. Commissioner or agent may examine books, etc. The Commissioner, or his authorized agents, may examine any books, papers, records, or other data bearing upon the correctness of any return, or for the purpose of making a return where none has been made, as required by this article, and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons. If any person summoned as a witness shall fail to obey any summons to appear before the Commissioner or his authorized agent, or shall refuse to testify or answer any material question or to produce any book, record, paper, or other data when required to do so, such failure or refusal shall be reported to the Attorney General or the district solicitor, who shall thereupon institute proceedings in the superior court of the county where such witness resides to compel obedience to any summons of the Commissioner, or his authorized agent. Officers who serve summonses or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the superior courts, to be paid from the proper appropriation for the administration of this article. (1939, c. 158, s. 424.)
- § 105-184. Excess payments; refund.—If upon examination of any monthly return made under this article it appears that an amount of tax has been paid in excess of that properly due, then the amount in excess shall be credited against any tax or installment thereof then due from the taxpayer, under any other subsequent monthly return, or shall be refunded to the taxpayer by certificate of overpayment issued by the Commissioner to the State Auditor, which shall be investigated and approved by the Attorney General, and the Auditor shall issue his warrant on the Treasurer, which warrant shall be payable out of any funds appropriated for that purpose. (1939, c. 158, s. 425.)
- § 105-185. Prior rights or actions not affected by this subchapter.—Nothing in this subchapter shall affect or defeat any claim, assessment, appeal, suit, right or cause of action for taxes due, under the Revenue Act of one thousand nine hundred thirty-seven, prior to March 24, 1939, whether such assessment, appeal, suit, claim or action shall have begun before March 24, 1939 or shall thereafter be begun; and the sections of the Revenue Act of one thousand nine hundred thirty-seven, amended or repealed by this subchapter, are expressly continued in full force, effect, and operation for the purpose of assessment and collection of any taxes due under any such laws prior to March 24, 1939, and for the imposition of any penalties, forfeitures, or claims for a failure to comply therewith. (1939, c. 158, s. 426.)
- § 105-186. To prevent unfair trade practices, Commissioner of Revenue may require tax passed on to consumer.—In order that fair trade practices may be encouraged and any deleterious effect of the retail sales tax levy may be minimized, the Commissioner of Revenue is empowered and directed to devise, promulgate and enforce regulations under which retail merchants shall collect from the consumers, by rule uniform as to classes of business, the sales tax levied upon their business by this article: Provided, that the Commissioner of Revenue shall have the power to change the regulations and methods under which the merchants shall collect the tax from the consumers, from time to time, as experience may prove expedient and advisable. Methods for the passing on by merchants to their customers the retail sales tax on sales to said customers may include plans which require both more and less than the prescribed rate of the tax on the sale price, the purpose being to enable the merchants

to collect approximately the amount of the tax imposed on their total sales volume. The Commissioner of Revenue is hereby authorized and empowered to make and adopt rules and regulations requiring merchants to use tokens or stamps, or other means, if found to be practical, which may be determined by the Commissioner to provide a method whereby the amount of the tax collected by the merchant from the customer shall be as nearly as possible the prescribed rate of the tax on each purchase. Such regulations as herein authorized shall be promulgated by the Commissioner of Revenue to become effective after reasonable notice to the retail merchants and when so promulgated they shall have the full force and effect of law. Any merchant who violates such rules and regulations shall be guilty of a misdemeanor and upon conviction shall be fined not less than five dollars (\$5.00) nor more than five hundred dollars (\$500.00) or be imprisoned for not more than six months, or be both fined and imprisoned in the discretion of the court: Provided, however, that every such violation shall be a separate offense hereunder. It shall be the duty of the solicitors of the several judicial districts of the State to prosecute violations of this section.

The provisions of this section shall not affect in any manner the character or validity of the sales tax levy as a merchants' license tax, and they may not be pleaded or considered in the event any provision of this subchapter is attacked as

unconstitutional. (1939, c. 262.)

Editor's Note.—See 12 N. C. Law Rev. 99 for an article on "Sales Tax and Transactions."

§ 105-187. Tax on building materials.—There is hereby levied and there shall be collected from every person, firm, or corporation, an excise tax of three per cent of the purchase price of all tangible personal property purchased or used subsequent to June 30, 1939, which shall enter into or become a part of any building or any other kind of structure in this State, including all materials, supplies, fixtures and equipment of every kind and description which shall be annexed thereto or in any manner become a part thereof, except rough and dressed lumber (but not millwork), brick or hollow tile, cement blocks, cinder blocks, clinker blocks, sand, gravel, crushed stone, rock, and granite.

The provisions of this section shall not apply:

(a) In respect to the use of any such article of tangible personal property, the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this section, whether under the laws of this State or of some other state or territory of the United States: Provided, that if the tax imposed on the sale or use of such tangible personal property imposed by other laws on the sale or use of such property is less than the tax imposed by this section, the provisions of this section shall apply, but at a rate measured by the difference between the rate herein fixed and the rate by which the previous tax upon the sale or use of such property was computed: Provided, that the tax upon the use of a single article of merchandise shall be limited as provided in Schedule E. and shall not apply to tangible personal property exempt from tax and/or classified, when sold, as wholesale sales under the provisions of Schedule E preceding this section in Schedule E.

(b) In respect to such tangible personal property as shall enter into any building or structure erected or constructed under any contract with the State of North Carolina or any of its agencies or with any county or municipality in North Carolina or any of their agencies.

Every person liable for the tax imposed by this section shall report to the Commissioner of Revenue and pay the taxes herein levied in accordance with the provisions of Schedule E and in so far as the provisions of said article are appropriate and not inconsistent herewith, shall be liable for all penalties and shall be subject to all of the provisions of said article. The provisions of said

article relating to the administration of said subchapter, auditing of returns and as to the authority and powers of the Commissioner to make rules and regulations for the administration of this section, shall be deemed and taken as a part of this section. The definitions of terms, so far as may be applicable to this section, contained in Schedule E, shall be treated as definitions applicable to this section.

The taxes levied in this section shall be levied against the purchaser of the articles named. If purchases of building materials that are not exempt from tax are made by a contractor there shall be joint liability for the tax against both contractor and owner, but the liability of the owner shall be satisfied if affidavit is required of the contractor, and furnished by him, before final settlement is made, showing that the tax herein levied has been paid in full.

(c) A receipt given by a retail merchant maintaining a place of business in this State, showing thereon that the retail sales tax imposed by Schedule E, will be paid by such retail merchant on the article of commerce included within said purchase, shall be sufficient to relieve the purchaser from further liability for tax imposed by this section: Provided further, that the Commissioner may, by rule and regulation, provide that a similar receipt from a retailer who does not maintain a place of business in this State shall also be sufficient to relieve the purchaser of further liability for the tax to which such receipt may refer.

The term "retail merchant," as used in this subsection, shall include wholesalers, jobbers, manufacturers, or their agents, selling taxable building materials for use or consumption in this State to others than merchants for resale. (1939,

c. 158, s. 427; 1943, c. 400, s. 5; 1949, c. 392, s. 4.)

Editor's Note.—The 1943 amendment struck out the words "with the federal government or any of its agencies, or" which formerly appeared after the word "contract" in the first paragraph of sub-

section (b).

The 1949 amendment rewrote the first

paragraph. For brief comment on the amendment, see 27 N. C. Law Rev. 485.

ARTICLE 6.

Schedule G. Gift Taxes.

§ 105-188. Gift taxes; classification of beneficiaries; exemptions; rates of tax.—State gift taxes, as hereinafter prescribed, are hereby levied upon the shares of the respective beneficiaries in all property within the jurisdiction of this State, real, personal and mixed, and any interest therein which shall in any one calendar year pass by gift made after March 24, 1939.

The taxes shall apply whether the gift is in trust or otherwise and whether the gift is direct or indirect. In the case of a gift made by a nonresident, the taxes shall apply only if the property is within the jurisdiction of this State. The taxes shall not apply to gifts made prior to March 24, 1939.

The tax shall not apply to the passage of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a passage from the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a passage by donor of such income by gift.

Gifts to any one donee not exceeding a total value of one thousand dollars (\$1,000.00) in any one calendar year shall not be considered gifts taxable under this article, and where gifts are made to any one donee in any one calendar year in excess of one thousand dollars (\$1,000.00), only that portion of said gifts exceeding one thousand dollars (\$1,000.00) in value shall be subject to the tax levied by this article.

The tax shall be based on the aggregate sum of the net gifts made by the donor to the same donee, and shall be computed as follows:

- 1. Determine the aggregate sum of the net gifts to the donee for the calendar year and the net gifts to the same donee for each of the preceding calendar years since January 1st, 1948.
- 2. Compute the tax upon said aggregate sum by applying the rates hereinafter set out.
- 3. From the tax thus computed, deduct the total gift tax, if any, paid with respect to gifts to the same donee in any prior year or years since January 1st, 1948. The sum thus ascertained shall be the gift tax due.

The term "net gifts" shall mean the sum of the gifts made by a donor to the same donee during any stated period of time in excess of the annual exclusion and the applicable specific exemption.

The rates of tax, which are based on the relationship between the donor and the donee, shall be as follows:

(a) Where the donee is lineal issue, or lineal ancestor, or husband, or wife of the donor, or child adopted by the donor in conformity with the laws of this State, or of any of the United States, or of any foreign kingdom or nation, or stepchild of the donor (for each one hundred dollars (\$100.00) or fraction thereof):

First \$ 10,000 above exemption	1 per cent
Over \$ 10,000 and to \$ 25,000	2 per cent
Over \$ 25,000 and to \$ 50,000	3 per cent
Over \$ 50,000 and to \$ 100,000	4 per cent
Over \$ 100,000 and to \$ 200,000	5 per cent
Over \$ 200,000 and to \$ 500,000	6 per cent
Over \$ 500,000 and to \$1,000,000	7 per cent
Over \$1,000,000 and to \$1,500,000	8 per cent
Over \$1,500,000 and to \$2,000,000	9 per cent
Over \$2,000,000 and to \$2,500,000	10 per cent
Over \$2,500,000 and to \$3,000,000	11 per cent
Over \$3,000,000	12 per cent

(b) Where the donee is the brother or sister, or descendant of the brother or sister, or is the uncle or aunt by blood of the donor (for each one hundred dollars (\$100.00) or fraction thereof):

First	\$	5,000					 		 	 	 	 			4	per	cent
Over	\$	5,000	and	to	\$	10,000	 	 	 	 	 		 	 	5		cent
Over	\$	10,000	and	to	\$	25,000		 	 	 	 		 		6	per	cent
Over	\$	25,000	and	to	\$	50,000	 		 	 	 		 		7	per	cent
Over		50,000	and	to	\$	100,000	 	 	 	 	 		 	 	8	per	cent
Over	\$	100,000	and	to	\$	250,000	 	 	 	 	 		 		10	per	cent
Over	\$	250,000	and	to	\$	500,000	 	 	 	 	 		 		11	per	cent
Over	\$	500,000	and	to	\$1	,000,000	 	 	 	 	 		 		12	per	cent
Over	\$1	,000,000	and	to	\$1	,500,000	 		 	 	 		 		13	per	cent
Over	\$1	,500,000	and	to	\$2	,000,000	 		 	 	 		 		14	per	cent
Over	\$2	,000,000	and	to	\$3	,000,000	 		 	 	 		 		15	per	cent
Over	\$3	,000,000					 		 	 		 		 ٠	16	per	cent

(c) Where the donee is in any other degree of relationship than is herein-before stated, or shall be a stranger in blood to the donor, or shall be a body politic or corporate (for each one hundred dollars (\$100.00) or fraction thereof):

First	\$	10,000								 ۰	 	 		. 1	٠		 	8	per	cent
Over	\$	10,000	and	to	\$	25,0	00		 			 						 9	per	cent
Over	\$	25,000	and	to	\$	50,0	00		 		 	 						 10	per	cent
Over	\$	50,000	and	to	\$	100,0	00		 		 	 				0 0	 	 11	per	cent
Over	\$	100,000	and	to	\$	250,0	00	٠	 			 	0 0					 12	per	cent
Over	\$	250,000	and	to	\$	500,0	00		 		 	 						 13	per	cent
Over	\$	500,000	and	to	\$1	,000,0	00		 		 	 						 14	per	cent
		,000,000																		
Over	\$1	,500,000	and	to	\$2	,500,0	00		 	 		 					 	 16	per	cent
Over	\$2	,500,000							 8	 		 					 	 17	per	cent

A donor shall be entitled to a total exemption of twenty-five thousand dollars (\$25,000.00) to be deducted from gifts made to donees named in subsection (a) of this section, less the sum of amounts claimed and allowed as an exemption in prior calendar years. The exemption, at the option of the donor, may be taken in its entirety in a single year, or may spread over a period of years. When this exemption has been exhausted, no further exemption is allowable. When the exemption or any portion thereof is applied to gifts to more than one donee in any one calendar year, said exemption shall be apportioned against said gifts in the same ratio as the gross value of the gifts to each donee is to the total value of said gifts in the calendar year in which said gifts are made. No exemption shall be allowed to a donor for gifts made to donees named in subsections (b) and (c) of this section.

It is expressly provided, however, that the tax levied in this article shall not apply to so much of said property as shall so pass exclusively: (1) for state, county or municipal purposes within this State; (2) to or for the exclusive benefit of charitable, educational, or religious organizations located within this State, no part of the net earnings of which inures to the benefit of any private shareholder or individual; (3) to or for the exclusive benefit of charitable, religious and educational corporations, foundations and trusts, not conducted for profit, incorporated or created or administered under the laws of any other state, when such other state levies no gift taxes upon property similarly passing from residents of such state to charitable, educational or religious corporations, foundations and trusts incorporated or created or administered under the laws of this State, or when such corporation, foundation or trust receives and disburses funds donated in this State for religious, charitable and educational purposes. (1939, c. 158, s. 600; 1943, c. 400, s. 7; 1945, c. 708, s. 7; 1947, c. 501, s. 6.)

Editor's Note.— The 1943 amendment added to the fourth paragraph the provision relating to gifts exceeding one thousand dollars. It also made changes in the second paragraph of subsection (c) by rewriting the second sentence and inserting the third and fourth sentences.

The 1945 amendment made changes in the last paragraph of subsection (c).

The 1947 amendment struck out the fornier fifth paragraph and inserted in lieu

Editor's Note. — The 1943 amendment thereof the portions of this section beginning to gifts exceeding one thousand going down to subsection (a).

For comment on enactment, see 17 N. C. Law Rev. 389. For comment on the 1947 amendment, see 25 N. C. Law Rev. 467. For article on gift taxes, see 16 N. C. Law Rev. 194. For article on planning for North Carolina death and gift taxes, see 27 N. C. Law Rev. 114.

§ 105-189. Transfer for less than adequate and full consideration.—Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this article, be deemed a gift and shall be included in computing the amount of gifts made during the calendar year. (1939, c. 158, s. 601.)

§ 105-190. Gifts made in property.—If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. (1939, c. 158, s. 602.)

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§ 105-191. Manner of determining tax; time of payment; application to Department of Revenue for correction of assessment.—The tax imposed by this article shall be paid by the donor on or before the fifteenth day of March following the close of the calendar year.

Report of the gifts shall be made by the donor to the State Department of Revenue on blank forms prepared by the State Department of Revenue and furnished on application to any taxpaver, and the amount of tax due shall be paid at the time such report is made. The Department of Revenue shall audit the returns made under this article, and if it is found that the amount of tax paid is less than the amount lawfully due under the provisions of this article shall forward a statement of the taxes determined to the person or persons primarily chargeable with the payment thereof, such additional taxes to be collected under the same rules and regulations contained in this subchapter for the collection of other taxes, and if an overpayment should be found to have been made, a refund of such overpayment shall be made to the taxpayer. Within one year after the tax has been determined, any person aggrieved by the determination, may apply in writing to the Department of Revenue, which may make such corrections of the taxes as it may determine proper: Provided, however, that the rejection of the application in whole or in part by the Department of Revenue shall not prevent any person from applying to the court, as hereinafter provided, for the correction of said taxes. (1939, c. 158, s. 603.)

§ 105-192. Penalties and interest.—In any case where a donor fails to file a return at the proper time, the Department of Revenue shall assess a penalty of ten per centum (10%) of the tax determined by it, together with interest upon such tax and penalty at the rate of six per centum (6%) per annum from the date when such report should have been filed until the date of the assessment.

If any tax, or any assessment of tax, penalties and interest, or any part thereof, be not paid when due, it shall bear interest at six per centum (6%) per annum from the date same is due until paid. (1939, c. 158, s. 604; 1947, c. 501, s. 6.)

Editor's Note.—The 1947 amendment graph the words "same is due until paid" substituted at the end of the second parafor the words "of assessment until paid."

§ 105-193. Lien for tax; collection of tax.—The tax imposed by this article shall be a lien upon all gifts that constitute the basis for the tax for a period of ten years from the time they are made. If the tax is not paid by the donor when due, each donee shall be personally liable, to the extent of their respective gifts, for so much of the tax as may have been assessed, or may be assessable thereon. Any part of the property comprised in the gift that may have been sold by the donee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien hereby imposed and the lien, to the extent of the value of such gift, shall attach to all the property of the donee (including after-acquired property) except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

If the tax is not paid within thirty days after it has become due, the Department of Revenue may use any of the methods authorized in this subchapter for the collection of other taxes to enforce the payment of taxes assessed under this article.

In any proceeding by warrant or otherwise to enforce the collection of said tax, the donor shall be liable for the full amount of the tax due by reason of all the gifts constituting the basis for such tax, and each donee shall be liable only for so much of said tax as may be due on account of his respective gift. (1939, c. 158, s. 605.)

§ 105-194. Period of limitation upon assessment; assessment upon failure or refusal to file proper return. — Except as provided in the next

succeeding paragraph the amount of taxes imposed by this article shall be assessed within three years after the return was filed.

In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed at any time. Where a donor dies within three years after filing a return, taxes may be assessed at any time within said three years, or the date of final settlement of State inheritance taxes.

If a donor should fail or refuse on demand to file a correct and proper return as required by this article, the Department of Revenue may make an estimate of the amount of taxes due the State by such donor, and by the respective donees. from any information in its possession, and assess the taxes, penalties and interest due the State by such taxpayers. (1939, c. 158, s. 606; 1947, c. 501, s. 6.)

Editor's Note. - The 1947 amendment added the second sentence to the second paragraph.

8 105-195. Tax to be assessed upon actual value of property; manner of determining value of annuities, life estates and interests less than absolute interest. — Said taxes shall be assessed upon the actual value of the property at the time of the transfer by gift. In every case where there shall be a gift to take effect in possession or enjoyment after the expiration of one or more life estates, or at any time in the future, the tax shall be assessed on the actual value of the property or the interest of the beneficiary therein at the time when he or she becomes entitled to the same in possession or enjoyment The value of an annuity or a life interest in such property, or any interest therein less than an absolute interest, shall be determined by the annuity tables provided tor by § 8-47, and upon the basis of six per centum (6%) of the gross value of the estate for the period of expectancy of the life tenant or for the period of the duration of said estate, if said estate is other than a life estate, in determining the value of the respective interests. In every case in which it is impossible to compute the present value of any interest in property so passing, the Department of Revenue may effect such settlement of the tax as it shall deem to be for the best interest of the State, and payment of the same so agreed upon shall be a full satisfaction of such taxes. (1939, c. 158, s. 607; 1943, c. 400, s. 7.)

Editor's Note. - The 1943 amendment added that part of the third sentence appearing after "§ 8-47."

- § 105-196. Application for relief from taxes assessed; appeal. A taxpayer may apply to the Commissioner of Revenue for revision of the tax assessed against him at any time within three years from the time of the filing of the return or from the date of the notice of assessment of any additional tax. The Commissioner shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to law and the facts, and adjust the computation of tax accordingly. The Commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due. The taxpayer shall have the right of appeal from any assessment, made by the Commissioner of Revenue in the same manner and form as set out in § 105-163 with respect to income taxes. (1939, c. 158, s. 608.)
- § 105-197. Returns; time of filing; extension of time for filing. Any person who within the calendar year nineteen hundred thirty-nine, after March 24, 1939, or any calendar year thereafter, makes any gift or gifts taxed by this article shall report in duplicate, under oath, to the Department of Revenue, on forms provided for that purpose, showing therein an itemized schedule of all such gifts, the name and residence of each donce and the actual value of the gift to each, the relationship of each of such persons to the donor, and any other infor-

mation which the Department of Revenue may require. Such returns shall be filed on or before the fifteenth day of March following the close of the calendar year. The Department of Revenue may grant a reasonable extension of time for filing a report whenever in its judgment good cause exists. (1939, c. 158, s. 609.)

ARTICLE 7.

Schedule H. Intangible Personal Property.

§ 105-198. Intangible personal property. — The intangible personal properties enumerated and defined in this article or schedule are hereby classified under authority of section three, Article V of the Constitution, and the taxes levied thereon are for the benefit of the State and the political subdivisions of the State as hereinafter provided and said taxes so levied for the benefit of the political subdivisions of the State are levied for and on behalf of said political subdivisions of the State to the same extent and manner as if said levies were made by the governing authorities of the said subdivisions for distribution therein as hereinafter provided. (1939, c. 158, s. 700.)

Editor's Note.—For comment on article,

see 17 N. C. Law Rev. 390.

County Board of Education Denied Recovery of Funds Allocated to Municipality from Tax.—In Board of Education v. Wilson, 215 N. C. 216, 1 S. E. (2d) 544 (1939), it was held that the county board of education was not entitled to recover from municipality funds allocated to it by State from intangible tax provided by this section, even though municipality is in nowise liable for maintenance of constitutional school term, since it could not expend the funds as agent of the municipality in discharging the debts of the municipality for school purposes since the municipality had no

such debt, nor could it expend such funds for school purposes in any of its districts since there was no district coterminous with the municipal limits and such expenditure would take taxes collected from citizens of the municipality and expend same in part for the benefit of those living outside its limits, and since the act does not provide for distribution of the funds to the county board of education in such cases and such provisions may not be interpolated therein, and since by a proper construction of the act the provision for expenditure for school purposes may relate to counties rather than to cities and towns.

§ 105-199. Money on deposit. — All money on deposit (including certificates of deposit and postal savings) with any bank or other corporation, firm or person doing a banking business, whether such money be actually in or out of this State, having a business, commercial or taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of ten cents (10c) on every one hundred dollars (\$100.00) of the total amount of such deposit without deduction for any indebtedness or liabilities of the taxpayer.

For the purpose of determining the amount of deposits subject to this tax every such bank or other corporation, firm or person doing a banking business shall set up the credit balance of each depositor on the fifteenth day of each February, May, August, and November in the calendar year next preceding the due date of tax return, and the average of such quarterly credit balances shall constitute the amount of deposit of each depositor subject to the tax herein levied; for the purposes of this section accounts having an average of quarterly balances for the

year of less than three hundred dollars (\$300.00) may be disregarded.

The tax levied in this section upon money on deposit shall be paid by the cashier, treasurer or other officer or officers of every such bank or other corporation, firm or person doing a banking business in this State by report and payment to the Commissioner of Revenue on or before March fifteenth of each year; any taxes so paid as agent for the depositor shall be recovered from the owners thereof by the bank or other corporation, firm or person doing a banking business in this State by deduction from the account of the depositor on November sixteenth of each year or on such date thereafter as in the ordinary course of business it becomes convenient to make such charge. The bank may immediately report and pay

the tax due on any account closed out during any quarter in which the bank has withheld the amount of the tax. The tax on deposits represented by time certificates shall be chargeable to the original depositor unless such depositor has given notice to the depository bank of transfer of such certificate of deposit. Accounts that have been closed during the year, leaving no credit balance against which the tax can be charged, may be reported separately to the Commissioner of Revenue and the tax due on such accounts shall become a charge directly against the depositor, and such tax may be collected by the Commissioner of Revenue from the depositor in the same manner as other taxes levied in this act; the bank or other corporation, firm or person doing a banking business in this State shall not be held liable for the payment of the tax due on accounts so reported. None of the provisions of this section shall be construed to relieve any taxpayer of liability for a full and complete return of postal savings and of all money on deposit outside this State having business, commercial or taxable situs in this State.

The tax levied in this section shall not apply to deposits by one bank in another bank, nor to deposits of the United States, State of North Carolina, political subdivisions of this State or agencies of such governmental units. Deposits representing the actual payment of benefits to World War veterans by the federal government, when not reinvested, shall not be subject to the tax levied in this section. Further, deposits in North Carolina banks by nonresident individuals and foreign corporations, when such deposits are not related to business activities in this State, shall not be subject to the tax levied in this section. The tax levied in this section shall not apply to deposits of foreign and alien insurance companies which pay the two and one-half per cent $(2\frac{1}{2}\%)$ gross premium tax levied by § 105-228.5. (1939, c. 158, s. 701; 1945, c. 708, s. 8; 1947, c. 501, s. 7; 1949,

c. 392, s. 5.)

Editor's Note.—The 1945 amendment substituted in the second paragraph "February, May, August and November" for "March, June, September and December," inserted the second sentence of paragraph three and added the next to the last sentence of the section.

The 1947 amendment increased the amount of the quarterly balances mentioned in the second paragraph from \$100

to \$300. It also substituted "November" for "December" in the first sentence of the third paragraph.

The 1949 amendment added the last sentence of the section. For brief comment on amendment, see 27 N. C. Law Rev. 485.

The word "act" in line six from the end of the third paragraph of this section probably should read "subchapter."

- § 105-200. Money on hand.—All money on hand (including money in safe deposit boxes, safes, cash registers, etc.) on December thirty-first of each year, having a business, commercial or taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars (\$100.00) of the total amount of such money on hand without deduction for any indebtedness or liabilities of the taxpayer. (1939, c. 158, s. 702.)
- § 105-201. Accounts receivable.—All accounts receivable on December thirty-first of each year, having a business, commercial or taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars (\$100.00) of the face value of such accounts receivable: Provided, that from the face value of such accounts receivable there may be deducted the accounts payable of the taxpayer: Provided further, that no deduction in any case shall be allowed under this section of any indebtedness of the taxpayer on account of capital outlay, permanent additions to capital or purchase of capital assets. The term "accounts payable" as used in this section shall not include: (a) reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability; (b) taxes of any kind owing by the taxpayer; (c) debts owed to a corporation of which the taxpayer is parent or subsidiary or with which the taxpayer is closely affiliated by stock ownership or with which the taxpayer is sub-

sidiary of same parent corporation unless the credits created by such debts are listed if so required by law for ad valorem or property taxation, for taxation at the situs of such credits; or (d) debts incurred to purchase assets which are not sub-

ject to taxation at the situs of such assets.

From the total face value of accounts receivable returned to this State for taxation by or in behalf of any taxpayer who or which also owns other such accounts receivable as have situs outside of this State, accounts payable of the taxpayer may be deducted only in the proportion which the total face value of accounts receivable taxable under this section bears to the total face value of all accounts receivable of the taxpayer.

The term "accounts payable" as used in this section shall be deemed to include current notes payable of the taxpayer incurred to secure funds which have been actually paid on his current accounts payable within one hundred and twenty days prior to the date as of which the intangible tax return is made. (1939, c. 158, s.

703; 1941, c. 50, s. 8.)

Editor's Note. — The 1941 amendment added the last paragraph. For comments on amendment, see 19 N. C. Law Rev. 539.

§ 105-202. Bonds, notes, and other evidences of debt. — All bonds, notes, demands, claims and other evidences of debt however evidenced, whether secured by mortgage, deed of trust, judgment or otherwise, or not so secured, having a business, commercial or taxable situs in this State on December thirty-first of each year shall be subject to annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars (\$100.00) of the actual value thereof: Provided, that from the actual value of such bonds, notes, demands, claims and other evidences of debt there may be deducted like evidences of debt owed by the taxpayer on December thirty-first of the same year. The term "like evidences of debt" deductible under this section shall not include: (a) accounts payable; (b) taxes of any kind owing by the taxpayer; (c) reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability; (d) evidences of debt owed to a corporation of which the taxpayer is parent or subsidiary or with which the taxpayer is closely affiliated by stock ownership or with which the taxpayer is subsidiary of same parent corporation, unless the credits created by such evidences of debt are listed, if so required by law for ad valorem or property taxation, for taxation at the situs of such credits; or (e) debts incurred to purchase assets which are not subject to taxation at the situs of such assets.

From the total actual value of bonds, notes, demands, claims and other evidences of debt returned to this State for taxation by or in behalf of any taxpayer who or which also owns other such evidences of debt as have situs outside of this State, like evidences of debt owed by the taxpayer may be deducted only in the proportion which the total actual value of evidences of debt taxable under this section bears to the total actual value of all like evidences of debt owed by the taxable under taxable un

payer.

The tax levied in this section shall not apply to bonds, notes and other evidences of debt of the United States, State of North Carolina, political subdivisions of this State or agencies of such governmental units, but the tax shall apply to all bonds and other evidences of debt of political subdivisions and governmental units other

than those specifically excluded herein.

In every action or suit in any court for the collection on any bonds, notes, demands, claims or other evidences of debt, the plaintiff shall be required to allege in his pleadings or to prove at any time before final judgment is entered (1) that such bonds, notes or other evidences of debt have been assessed for taxation for each and every tax year, under the provisions of this article, during which the plaintiff was owner of same, not exceeding five years prior to that in which the suit or action is brought; or (2) that such bonds, notes or other evidences of debt

sued upon are not taxable hereunder in the hands of the plaintiff; or (3) that the suitor has not paid, or is unable to pay such taxes, penalties and interest as might be due, but is willing for the same to be paid out of the first recovery on the evidence of debt sued upon. When in any action at law or suit in equity it is ascertained that there are unpaid taxes, penalties and interest due on the evidence of debt sought to be enforced, and the suitor makes it appear to the court that he has not paid or is unable to pay said taxes, penalties and interest, but is willing for the same to be paid out of the first recovery on the evidence of debt, the court shall have authority to enter as a part of any judgment or decretal order in said proceedings that the amount of taxes, penalties and interest due and owing shall be paid to the proper officer out of the first collection on said judgment or decree. The title to real estate heretofore or hereafter sold under a deed of trust shall not be drawn in question upon the ground that the holder of the notes secured by such deed of trust did not list and return the same for taxation as required by this article. (1939, c. 158, s. 704; 1947, c. 501, s. 7.)

Editor's Note.—The 1947 amendment decreased the tax mentioned in the first sentence from 50 to 25 cents.

Judgment Provision as to Payment of Taxes.—Nonpayment of taxes on a note in suit is nullified by a provision in the judgment on the note that taxes, penalties and interest due shall be paid to the proper officers out of the first collections on the judgment. This is in accord with this section. Roberts v. Grogan, 222 N. C. 30, 21 S. E.

(2d) 829 (1942).

Former Law—Failure to List Solvent Credits.—The failure to list solvent credits as required by an earlier statute did not destroy the cause of action, but postponed recovery thereon until they were listed and the tax thereon was paid; this was because the statute did not make the failure to list such credits an absolute bar to their recovery. Martin v. Knight, 147 N. C. 564, 61 S. E. 447 (1908). The court said: "It was not the purpose of the legislature to release the debtor for failure to list by the creditor, but to postpone the recovery of the debt, if subject to taxation, until the tax is paid."

Same—Failure to List Debt Did Not Work Forfeiture.—Laws 1927, c. 71, § 64, was not construed to work a forfeiture, and did not prevent a recovery on evidence of debt not listed, but postponed the recovery of judgment thereon until listed and the taxes paid, and where in an action on a note this defense was pleaded, the trial court had the power to allow the plaintiff to list it and pay taxes thereon during the trial and give judgment. Wooten v. Bell, 196 N. C. 654, 146 S. E. 705 (1929).

Same—How Pleaded.—Under an earlier statute it was held that unless the failure to list a note and due bill for taxation, "with a view to evade the payment of taxes thereon," was pleaded, it could not be made the subject of an issue. Martin v. Knight, 147 N. C. 564, 61 S. E. 447 (1908). Whether or not this was an affirmative defense which must be set up in the answer or whether it might be taken advantage of upon the general denial was left undecided.

Same—Payment of Taxes into Court.—The amount of taxes due upon solvent credits could be paid into court, Corey v. Hooker, 171 N. C. 229, 88 S. E. 236 (1916), and when this was done it permitted the party to proceed to judgment. Hyatt v. Holloman, 168 N. C. 386, 84 S. E. 407 (1915).

A possessory action to recover a horse secured by chattel mortgage, brought by the assignee of the mortgage note against one to whom the mortgage had sold the horse, was not an action upon the note upon which the former statute required that the taxes be given in and paid before the owner was permitted to sue thereon. Hyatt v. Holloman, 168 N. C. 386, 84 S. E. 407 (1915).

An amount set apart by a mutual insurance company as a reserve for the rebate of unearned premiums to its policyholders upon cancellation of policies in accordance with its bylaws was properly deducted by the insurance company in listing its solvent credits for taxation. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N. C. 69, 185 S. E. 449 (1936), construing former statute.

§ 105-203. Shares of stock.—All shares of stock owned by residents of this State or having business, commercial or taxable situs in this State on December thirty-first of each year, with the exceptions hereinafter provided, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars (\$100.00) of the total fair market value thereof.

The tax herein levied shall not apply to shares of stock in banks, banking associations, trust companies or domestic insurance companies which are otherwise taxed in this State, nor to shares of stock in building and loan associations which pay a tax as levied under § 105-73; nor shall the tax apply to shares of stock in corporations which pay to this State a franchise tax on their entire capital stocks, surplus and undivided profits or entire gross receipts as provided under Schedule C. §§ 105-114 to 105-129, together with the tax upon all of the net income, if any, of such corporations as provided under §§ 105-130 to 105-163. With respect to corporations which pay to this State a franchise tax on a part of their capital stock, surplus and undivided profits or part of their gross receipts as provided in Schedule C. 88 105-114 to 105-129, and a tax upon a part of the net income of such corporations as provided under §§ 105-130 to 105-163, when such income is earned, there shall be exempt so much of the fair market value of such shares of stock as is represented by the percentage of net income on which tax is paid to this State. In the case of corporations having the same allocation ratios for income and franchise taxes paid to this State the allocation percentages reported on the franchise returns due in July of each year and received in the year, may be used to determine the portion of the value of the shares of stock of such corporations taxable under this section. In the case of foreign insurance corporations paying tax on gross premiums under the provisions of § 105-228.5 there shall be exempt that proportion of the fair market value of the shares of stock as is represented by the percentage of total gross premiums of such corporations taxed in this State.

Indebtedness incurred directly for the purchase of shares of stock may be deducted from the total value of such shares: Provided, the specific shares of stock so purchased are pledged as collateral to secure said indebtedness; provided, further, that only so much of said indebtedness may be deducted as is in the same proportion as the taxable value of said shares of stock is to the total value of said shares of stock. (1939, c. 158, s. 705; 1941, c. 50, s. 8; 1945, c. 708, s. 8; c. 752, s. 4; 1947, c. 501, s. 7.)

Editor's Note. — The 1941 amendment added the last paragraph.

The first 1945 amendment inserted the next to the last sentence of the second paragraph. The second 1945 amendment substituted near the beginning of the paragraph the words "domestic insurance companies" for the words "insurance companies not exempted from an income tax under subsection 2 (f) of § 105-134." It also added the last sentence of the paragraph,

The 1947 amendment decreased the tax mentioned in the first paragraph from 30 to 25 cents.

Situs of Stock under Former Law.—Under an earlier statute it was held that the property in shares of stock in a corporation doing business outside the corporate limits of a town, and owned by persons residing therein, did not follow and was not fixed by the situs of the residence of its owner, but was fixed by the legislature prescribing where and how it should be listed and taxed, i. e., at the principal place of business of the corporation. Wiley v. Commissioners, 111 N. C. 397, 16 S. E. 542 (1892).

§ 105-204. Beneficial interest in foreign trusts. — The beneficial or equitable interest on December thirty-first of each year of any resident of this State, or of a nonresident having a business, commercial or taxable situs in this State, in any trust, trust fund or trust account (including custodian accounts) held by a foreign fiduciary, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars (\$100.00) of the total actual value thereof. (1939, c. 158, s. 706; 1941, c. 50, s. 8; 1947, c. 501, s. 7.)

Editor's Note.—The 1941 amendment ment decreased the tax rate from 30 to rewrote this section, and the 1947 amend- 25 cents.

§ 105-205. Funds on deposit with insurance companies. — All funds on deposit with insurance companies on December thirty-first of each year, belonging to or held in trust for a resident of this State or having acquired a taxable

situs in this State, shall be subject to an annual tax, which is hereby levied, of ten cents (10c) on every one hundred dollars (\$100.00) thereof. The term "funds on deposit" as used in this section shall mean all funds accrued or accruing by virtue of the death of the insured or the original maturity of a policy contract where the party or parties entitled to receive such funds might withdraw same at their option upon stipulated notice; provided, that in the determination of the tax liability under this section the first twenty thousand dollars (\$20,000.00) of such funds on deposit or paid over to and held by a bank as trustee shall be disregarded where such funds on deposit are payable wholly and exclusively to a widow and/or children of the person deceased whose death created such funds on deposit.

The tax levied in this section shall be paid by the treasurer, cashier or other officer or officers of every insurance company doing business in this State by report and payment to the Commissioner of Revenue on or before March fifteenth of each year; any taxes so paid as agent for the party or parties entitled to receive such funds shall be recovered from the owners thereof by deduction from the account of the owner on December thirty-first of each year or at such other time as in the ordinary course of business it becomes convenient to make such charge.

(1939, c. 158, s. 707; 1941, c. 50, s. 8; 1947, c. 501, s. 7.)

Editor's Note.—The 1941 amendment inserted the proviso at the end of the first paragraph.

The 1947 amendment decreased the tax rate mentioned in the first sentence from 25 to 10 cents.

§ 105-206. When taxes due and payable; date lien attaches; non-residents; forms for returns; extensions.—All taxes levied in this article or schedule shall become due and payable on the fifteenth day of March of each year, and the lien of such taxes shall attach annually to all real estate of the tax-payer within this State as of December thirty-first next preceding the date that such taxes become due and payable, regardless of the time at which liability for the tax may arise or the exact amount thereof be determined; and said lien shall continue until such taxes, with any interest, penalty and costs which shall accrue thereon, shall have been paid.

Every person, firm, association, corporation, clerk of court, guardian, trustee, executor, administrator, receiver, assignee for creditors, trustee in bankruptcy or other fiduciary owning or holding any intangible personal properties defined and classified and/or liable for or required to pay any tax levied, in this article or schedule, either as principal or agent, shall make and deliver to the Commissioner of Revenue in such form as he may prescribe a full, accurate and complete return of such tax liability; such return, together with the total amount of tax due, shall be filed on or before the fifteenth day of March in each year.

For the purpose of protecting the revenue of this State and to avoid discrimination and prevent evasion of the tax imposed by this article, every resident or nonresident person, firm, association, trustee or corporation, foreign or domestic, engaged in this State, either as principal or as agent or representative of or on behalf of another, in buying, selling, collecting, discounting, negotiating or otherwise dealing in or handling any of the intangible property defined in this article, shall be deemed to be doing business in this State for the purposes of this article, and the principal, superior or person on whose behalf such business is carried on in this State shall likewise be deemed to be doing business in this State, for the purpose of this article, and where such business is carried on in this State by a corporation, foreign or domestic, it and its parent corporation or the corporation which substantially owns or controls it, by stock ownership or otherwise, shall be deemed to be doing business in this State, for the purpose of this article, and in all such cases the said intangible property acquired in the conduct of such business in this State, and outstanding on December 31 of each year, shall be deemed to have a situs in this State and subject to the tax imposed by this article, notwithstanding any transfer between any of such parties and notwithstanding that the same may be kept or may then be outside of this State, and any of the intangible property defined in this article and acquired in the conduct of any business carried on in this State, and/or having a business, commercial or taxable situs in this State, shall be subject to said tax and returned for taxation by the owner thereof or by the agent, person, or corporation in this State employed by such owner to handle or collect the same.

The Commissioner of Revenue shall cause to be prepared blank forms for said returns and shall cause them to be distributed throughout the State, and to be furnished upon application; but failure to receive or secure form shall not relieve any taxpayer from the obligation of making full and complete return of intangible

personal properties as provided in this article or schedule.

The return required by this article or schedule shall be due on or before the date specified unless written application for extension of time in which to file, containing reasons therefor, is made to the Commissioner of Revenue on or before due date of return. The Commissioner of Revenue for good cause may extend the time for filing any such return, provided interest at the rate of six per cent (6%) per annum from due date of return is paid upon the total amount of tax due. (1939, c. 158, s. 708; 1941, c. 50, s. 8.)

the court was both a "receiver" and an "ac- combe County v. Walston, 174 N. C. 55, 93 counting officer" of funds paid into his hands in the course of litigation, within the

Editor's Note. - The 1941 amendment meaning of a former statute, and thereunrewrote the third paragraph of this section. der should properly list such funds for Funds in Custodia Legis-Listing by taxation, when no adjudication as to the Clerk under Former Law.—The clerk of rightful owners had been made. Edge-S. E. 460 (1917).

§ 105-207. Penalties; unlawful to refuse to make returns.—If any taxpayer, without intent to evade any tax imposed by this article or schedule, shall fail to file a return and pay the tax, if any be due, at the time required by or under the provisions of this article or schedule, but who shall voluntarily file a complete and correct return and pay the tax due within sixty days after due date, there shall be added to the tax an additional amount equal to five per cent (5%) thereof, said additional amount in no case to be less than one dollar (\$1.00), together with interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month or fraction thereof from the time said return was required to be filed until paid.

If any taxpayer fails voluntarily to file a return and/or pay the tax, if any be due, within sixty days after due date as required by this article or schedule, there shall be added to the tax an additional amount equal to twenty-five per cent (25%) thereof, said additional amount in no case to be less than two dollars (\$2.00), together with interest at the rate of one-half of one per cent (½ of 1%) per month or fraction thereof from time said return was required to be filed until

paid.

If any taxpayer who has failed to file a return or has filed an incorrect or insufficient return, and who has been notified by the Commissioner of Revenue of such delinquency, refuses or neglects within thirty days after such notice to file a proper return, the Commissioner of Revenue shall determine the tax liability of such taxpayer, according to his best information and belief, and shall assess the same at double the amount so determined plus the penalties and interest provided in this section for failure voluntarily to file return within sixty days after due date; the assessment so made by the Commissioner of Revenue shall be prima facie correct.

It shall be unlawful for any person to fail or refuse to make the return provided for in this article or schedule, or make any false or fraudulent return or false statement in any return of the tax, or any part thereof, imposed by this article; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof, imposed by this article; or for the

president, vice-president, secretary, or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required by this article, with the intent to evade the payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the Commissioner of Revenue or his duly appointed agent, or to refuse to offer testimony or produce any record as required. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than five hundred dollars (\$500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment, at the discretion of the court within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent statement. with the intent aforesaid, shall be guilty of the offense of perjury, and, on conviction thereof, shall be punished in the manner provided by law for the offense of perjury. Any company for which a false return shall be made or a return containing a false statement as aforesaid, shall be guilty of a misdemeanor, and may be punished by a fine of not more than one thousand dollars (\$1,000.00). (1939, c. 158, s. 709.)

§ 105-208. Examination of returns; additional taxes. — As soon as practicable after the return is filed the Commissioner of Revenue shall examine same together with any other facts within his knowledge, and shall compute the tax, and the amount so computed shall be the tax. If the tax found due shall be greater than the amount theretofore paid, the deficiency shall be paid to the Commissioner of Revenue within thirty days after date of notice to the taxpayer of such deficiency, and any overpayment of tax shall be returned to the taxpayer within thirty days after it is ascertained.

If the return is made in good faith and the understatement of the tax is not due to any fault of the taxpayer, there shall be no penalty or additional tax added because of such understatement, but interest shall be added to the amount of the deficiency at the rate of six per cent (6%) per annum until paid. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added to the amount of the deficiency five per cent (5%) thereof, together with interest at the rate of six per cent (6%) per annum until paid. If the understatement is found by the Commissioner of Revenue to be false or fraudulent, with intent to evade the tax, any additional tax found to be due and payable shall be doubled together with interest at the rate of six per cent (6%) per annum upon the total amount of tax so found. The interest provided for in this section shall in all cases be computed from the date the tax was

originally due to the date of payment.

If the Commissioner of Revenue discovers from the examination of the return or otherwise that the intangible personal property of any taxpayer, or any portion thereof, has not been assessed, he may, at any time within three years after the time when the return was due, give notice in writing to the taxpayer of such deficiency. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the Commissioner of Revenue, if within thirty days after giving notice of such proposed assessment he shall apply for such hearing in writing, explaining in detail his objections to same. If no request for such hearing is so made, such proposed assessment shall be final and conclusive. the request for hearing is made, the taxpayer shall be heard by the Commissioner of Revenue, and after such hearing the Commissioner of Revenue shall render his decision. The taxpayer shall be advised of his decision and such amount shall be due within ten days after notice is given. The provisions of this article with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or an additional tax shall not apply to the assessment of additional taxes upon fraudulent returns nor upon failure to file returns. (1939, c. 158, s. 710.)

§ 105-209. Information from the source; Commissioner of Revenue empowered to make regulations. — In addition to the other requirements of this article or schedule it shall be the duty of every domestic corporation and every foreign corporation doing business and/or owning property in this State, the shares of stock and bonds of which are subject to tax under the provisions of this article or schedule, to report not later than the fifteenth day of March of each year to the Commissioner of Revenue, in such form and manner as he may prescribe, the name and address of each registered stockholder or bondholder resident in this State as of the thirty-first day of December of each year; such report shall also include the number of shares of stock and/or the number of bonds, the par or face value of each, the dividends or interest paid on each such security during the calendar year next preceding date of report, all transfers of record made from residents of this State between the first and thirty-first days of December next preceding the date of the report herein required, and such other and further information as the Commissioner of Revenue may require.

The Commissioner of Revenue shall from time to time promulgate such rules and regulations, not inconsistent with this article or schedule for making returns and for the ascertainment, assessment and collection of the taxes imposed hereunder as he may deem necessary to enforce its provisions. (1939, c. 158, s. 711.)

§ 105-210. Moneyed capital coming into competition with the business of banks.—On all moneyed capital coming into competition with the business of banks, whether State or national, there is hereby annually levied a tax at the same rate as is assessed upon the shares of stock of such banks located in this State at the place of residence of such banks, less deduction of real estate otherwise taxed in this State, to the same extent and under the same corresponding conditions as this deduction is allowed in the assessment of such shares of stock of banks located in this State: Provided, that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business shall not be deemed moneyed capital within the meaning of this section.

In cases where the Commissioner of Revenue shall find moneyed capital, as specified in the preceding paragraph, to be in competition with banks, such moneyed capital shall be assessed by the same methods as applicable to the shares of banks, and shall be taxed at the same rates as are applicable to the shares of banks in the same locality where such moneyed capital is found to be in competition with banks. The rates of tax thus applied shall be in lieu of the rates of tax specified in this article. (1939, c. 158, s. 712; 1945, c. 708, s. 8.)

Editor's Note.—The 1945 amendment well as national banks and added the made this section applicable to State as second paragraph.

§ 105-211. Conversion of intangible personal property to evade taxation not to defeat assessment and collection of proper taxes; taxpayer's protection.—Any taxpayer who shall, for the purpose of evading taxation under the provisions of this article or schedule, within thirty days prior to December thirty-first of any year or other taxable dates, namely February fifteenth, May fifteenth, August fifteenth, and November fifteenth, either directly or indirectly, convert any intangible personal property taxable under the provisions of this article or schedule, or with like intent shall, either directly or indirectly, convert such intangible personal property into a class of property which is taxable in this State at a lower rate than the intangible personal property so converted, shall be taxable on such intangible personal property as if such conversion had not taken place; the fact that such taxpayer within thirty days after December thirty-first of any year, either directly or indirectly, converts such property nontaxable in this State or taxable at the lower rate in this State into

intangible personal property taxable at the higher rate shall be prima facie evidence of intent to evade taxation by this State, and the burden of proof shall be upon such taxpayer to show that the first conversion was for a bona fide purpose of investment and not for the purpose of evading taxation by this State.

Taxpayers making a complete return on or before March fifteenth of each year of all their holdings of intangible personal property as provided by this article or schedule (or by similar provisions of prior Revenue Act) shall not thereafter be held liable for failure to list such intangible personal property with the local taxing units of this State in previous years; the taxes levied in this article or schedule shall be in lieu of all other property taxes in this State on such intangible personal property. (1939, c. 158, s. 713; 1945, c. 708, s. 8.)

Editor's Note.—The 1945 amendment inserted in the first paragraph the words "or other taxable dates, namely February fifteenth, May fifteenth, August fifteenth, and November fifteenth."

Transaction Made in Good Faith.—A former statute which made it a misdemeanor for "any person to evade the payment of taxes by surrendering or exchanging certificates of deposit in any bank of this State or elsewhere for nontaxpaying securities" did not apply to the purchase

before the tax listing date of nontaxable United States or State bonds by funds subject to taxation, and thereafter selling the bonds and redepositing the amount, when the transaction was made in good faith and the bonds were bought and sold on the open market and the title thereto passed absolutely in both transactions, and the purchaser of the bonds could not be taxed on the purchase price. Trust Co. v. Nash County, 196 N. C. 704, 146 S. E. 861 (1929).

§ 105-212. Institutions exempted; conditional and other exemptions.—None of the taxes levied in this article or schedule shall apply to religious, educational, charitable or benevolent organizations not conducted for profit, nor to any funds held irrevocably in trust exclusively for the maintenance and care of places of burial; nor, on or after January first, one thousand nine hundred and forty-two, to any funds, evidences of debt, or securities held irrevocably in pension, profit sharing, stock bonus, or annuity trusts, or combinations thereof, established by employers for the purpose of distributing both the principal and income thereof exclusively to eligible employees, or the beneficiaries of such employees, if such trusts qualify for exemption from income tax under the provisions of § 105-138, subsection 10; insurance companies reporting premiums to the Insurance Commissioner of this State and paying a tax thereon under the provisions of Article 8B, Schedule I-B shall not be subject to the provisions of §§ 105-201, 105-202 and 105-203; building and loan associations paying a tax under the provisions of § 105-73 shall not be subject to the provisions of §§ 105-201, 105-202 and 105-203; State credit unions organized pursuant to the provisions of subchapter III, chapter fifty-four, paying the supervisory fees required by law, shall not be subject to any of the taxes levied in this article or schedule; banks, banking associations and trust companies shall not be subject to the tax levied in this article or schedule on evidences of debt held by them when said evidences of debt represent investment of funds on deposit with such banks, banking associations and trust companies: Provided, that each such institution must, upon request by the Commissioner of Revenue, establish in writing its claim for exemption as herein provided. The exemptions in this section shall apply only to those institutions, and only to the extent, specifically mentioned, and no other.

If any intangible personal property held or controlled by a fiduciary domiciled in this State is so held or controlled for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt under this section from the tax imposed by this article, such intangible personal property shall be partially or wholly exempt from taxation under the provisions of this article in the ratio which the net income distributed or distributable to such nonresident, nonresidents or organization, derived from such intangible personal property during the calendar year for which the taxes levied by this article are imposed, bears to the en-

tire net income derived from such intangible personal property during such calendar year. "Net income" shall be deemed to have the same meaning that it has in the income tax article. Where the intangible personal property for which this exemption is claimed is held or controlled with other property as a unit, allocation of appropriate deductions from gross income shall be made to that part of the entire gross income which is derived from the intangible personal property by direct method to the extent practicable; and otherwise by such other method as the Commissioner of Revenue shall find to be reasonable: Provided, that each fiduciary claiming the exemption provided in this paragraph shall, upon the request of the Commissioner of Revenue, establish in writing its claim to such exemption. No provision of law shall be construed as exempting trust funds or trust property from the taxes levied by this article except in the specific cases covered by this section.

A clerk of any court of this State may, upon written application therefor, obtain from the Commissioner of Revenue a certificate relieving the depository bank of such clerk from the duty of collecting the tax levied in this article or schedule from deposits of said clerk: Provided, that such clerk of court shall be liable under his official bond for the full and proper remittance to the Commissioner of Revenue under the provisions of this article or schedule of taxes due on any deposits so handled. (1939, c. 158, s. 714; 1943, c. 400, s. 8; 1945, c. 708, s. 8;

1947, c. 501, s. 7.)

Editor's Note.—The 1943 amendment inserted the provision relating to State credit unions.

The 1945 amendment inserted the words appearing between the first and second semicolons in the first paragraph.

The 1947 amendment substituted "one thousand nine hundred and forty-two" for

"one thousand nine hundred and fortyfour" near the beginning of the first paragraph, and substituted "Article 8B, Schedule I-B" for "§ 105-121" near the middle of the paragraph. It also inserted the second paragraph.

For discussion of the 1947 amendment,

see 25 N. C. Law Rev. 473.

§ 105-213. Separate records by counties; disposition and distribution of taxes collected; purpose of tax. — The Commissioner of Revenue shall keep a separate record by counties of tax collected under the provisions of this article or schedule, and shall not later than the twentieth day of July of each year submit to the State Board of Assessment an accurate account of such taxes collected during the fiscal year ending June thirtieth next preceding, showing separately by sections the total collections less refunds in each county of the State. The State Board of Assessment shall examine such reports and, if found to be correct, shall certify a copy of same to the State Auditor and State Treasurer. Twenty per cent (20%) of the total amount of such revenue shall be retained by the State for use in the maintenance and operation of the public school system of the State, and eighty per cent (80%) of such revenue shall be distributed to the counties and municipalities of the State on the following basis:

The amount distributable to each county and to the municipalities therein from the revenue collected under §§ 105-200, 105-201, 105-202 to 105-204 shall be determined upon the basis of the amounts collected in each county; the amount distributable to each county and to the municipalities therein from the revenue collected under §§ 105-199 and 105-205 shall be determined upon the basis of population in each county as shown by the latest federal decennial census. The amounts so allocated to each county shall in turn be divided between the county and all municipalities therein in proportion to the total amount of ad valorem taxes levied by each during the fiscal year preceding such distribution. Upon certification by the State Board of Assessment of the allocations herein provided for, it shall be the duty of the State Auditor to issue a warrant on the State Treasurer to the treasurer or other officer authorized to receive public funds of each county and municipality in the amount so allocated to each such county and municipality. It shall be the duty of the chairman of the board of county

commissioners of each such county and the mayor of each such municipality therein to report to the State Board of Assessment such information as it may request for its guidance in making said allotments to said units; and upon failure of any such county or municipality to make such report within the time prescribed by said State Board of Assessment, said Board may disregard such defaulting unit in making said allotments. The amounts so allocated to each county and municipality shall be distributed and used by said county or municipality in proportion to other property tax levies made for the various funds and activities of the taxing unit receiving said allotment. (1939, c. 158, s. 715; 1941, c. 50, s. 8; 1947, c. 501, s. 7.)

Editor's Note.—The 1941 amendment changed the percentages in the last sentence of the first paragraph from "forty" and "sixty" to "twenty-five" and "seventy-

five," respectively and the 1947 amendment changed the percentages to "twenty" and "eighty," respectively.

- § 105-214: Repealed by Session Laws 1947, c. 501, s. 7.
- § 105-215. Unconstitutionality or invalidity; interpretation; repeal.—If any clause, sentence, paragraph, or part of this article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this article or schedule, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. No caption of any section or set of sections shall in any way affect the interpretation of this act or any part thereof. All acts and parts of acts inconsistent with the provisions of this article or schedule are specifically hereby repealed. (1939, c. 158, s. 717.)
- § 105-216. Reversion to local units in case of invalidity. If any clause, sentence, paragraph, or part of this article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, and if by virtue of said judgment any one or all of the several taxes classified and levied in this article or schedule is/are held invalid, then the particular class or classes of intangible personal property affected by said judgment shall become subject to listing, assessment and taxation by the county, municipality, and other taxing jurisdictions in which said intangible personal property has situs in the same manner and at the same rates as applicable to real estate and other tangible properties: Provided, that in such case said listing, assessment and taxation of such intangible personal property by said local taxing units shall become valid and effective as of the tax listing date next preceding March 24, 1939, and shall continue thereafter with full force and effect as if such properties were made taxable by the local taxing units by direct statutory enactment. (1939, c. 158, s. 718.)
- § 105-217. Power of attorney. The Commissioner of Revenue shall have authority to require a proper power of attorney of each and every agent for any taxpayer under this article or schedule. (1939, c. 158, s. 719.)

ARTICLE 8.

Schedule I. Compensating Use Tax.

§ 105-218. Short title.—This article shall be known and may be cited as the "Compensating Use Tax Article." (1939, c. 158, s. 800; 1941, c. 50, s. 9.) Editor's Note.—The 1941 amendment as of July 1, 1941.

Editor's Note. — The 1941 amendment struck out the former article and inserted in lieu thereof the present article, effective

For comment on the 1939 enactment, see 17 N. C. Law Rev. 386.

§ 105-219. Definitions.—The following words, terms, and phrases when used in this article have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) "Storage" means and includes any keeping or retention of possession in this State for any purpose except sale in the regular course of business of tangible

personal property purchased from a retailer.

(b) "Use" means and includes the exercise of any right or power or dominion whatsoever over fangible personal property by a purchaser thereof and includes, but is not limited to, any withdrawal from storage, installation, affixation to real or personal property, exhaustion or consumption of tangible personal property by the owner or purchaser thereof, but shall not include the sale of tangible

personal property in the regular course of business.

(c) The word "sale" or "selling" shall mean any transfer of title or possession, or both, exchange, or barter of tangible personal property, conditional or otherwise, however affected and by whatever name called, for a consideration paid or to be paid, in installments or otherwise, and shall include any of said transactions whereby title or ownership is ultimately to pass notwithstanding the retention of title or possession, or both, for security or other purposes, and shall further mean and include any bailment, loan, lease, rental or license to use or consume tangible personal property for a consideration paid or to be paid, in installments or otherwise, in which possession of said property passes to the bailee, borrower, lessee, or licensee: Provided, the provisions of this subsection shall not apply to the lease or rental of motion picture films used for exhibition purposes and for which a license tax is imposed under the provisions of § 105-37.

(d) "Purchase" means the buying of, giving an order for, or offering to buy tangible personal property as a result of which there occurs a sale or delivery of tangible personal property by a retailer to a person for the purpose of storage, use, or consumption in this State, and includes the procuring of a retailer to erect, in-

stall, or apply tangible personal property for use in this State.

(e) "Sales price" means the total amount for which tangible personal property is sold, including all cost of transportation or delivery to the purchaser, whether paid by the purchaser to the retailer or to the carrier, and any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expenses whatsoever: Provided, however, that the cost for labor or services rendered in erecting, installing, or applying property sold shall not be included as a part of the sales price: Provided, further, that where a manufacturer, producer or contractor erects, installs, or applies tangible personal property for the account of or under contract with the owner of realty or other property, the sales price shall be the fair market value of such property at the time and place of sale.

(f) "Person" means and includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well as the

singular number.

(g) "Retailer" means and includes every person engaged in the business of making sales of tangible personal property, or peddling the same, or soliciting or taking orders for sales, whether for immediate or future delivery, for storage, use or consumption in this State, and every manufacturer, producer, or contractor engaged in business in this State and selling, delivering, erecting, installing, or applying tangible personal property for use in this State notwithstanding that said property may be permanently affixed to a building or to realty or to other tangible personal property: Provided, however, that when in the opinion of the Commissioner it is necessary for the efficient administration of this article to regard any salesmen, solicitors, representatives, consignees, peddlers, or canvassers as agents of the dealers, distributors, consignors, supervisors, principals or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, consignors, supervisors, princi-

pals, or employers, the Commissioner may so regard them and may regard the dealers, distributors, consignors, supervisors, principals, or employers as retailers for purposes of this article.

(h) "Commissioner" means Commissioner of Revenue of the State of North

Carolina

(i) "Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses, but shall not include electricity, gas or water delivered by or through main

lines or pipes either for commercial or domestic use or consumption.

(j) "Engaged in business in this State" shall mean the selling or delivering in this State or any activity in this State in connection with the selling or delivering in this State of tangible personal property for storage, use, or consumption in this State, and includes, but is not limited to, any of the following acts or methods of transacting business: Maintaining, occupying or using, permanently or temporarily, directly, indirectly, or through a subsidiary or agent, by whatever name called, any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business, or, permanently or temporarily, directly or through a subsidiary, having any representative, agent, salesman, canvasser, or solicitor operating in the State in such selling or delivering, and the fact that any corporate retailer, agent, or subsidiary, engaged in business in this State, may not be legally domesticated or qualified to do business in this State, shall be immaterial.

(k) "In this State" or "in the State" means within the exterior limits of the State of North Carolina, and includes all territory within such limits owned by or ceded to the United States of America. (1939, c. 158, s. 801; 1941, c. 50, s. 9; 1945, c. 708, s. 9.)

Editor's Note.—The 1945 amendment inserted immediately before the proviso of subsection (c) the words "in which possession of said property passes to the bailee, borrower, lessee, or licensee." It also sub-

stituted for the latter part of the provison the words "license tax is imposed under the provisions of § 105-37."

Cited in Johnston v. Gill, 224 N. C. 638,

32 S. E. (2d) 30 (1944).

§ 105-220. Taxes levied. — An excise tax is hereby levied and imposed on the storage, use, or consumption in this State of tangible personal property purchased from a retailer within or without this State on or after July first, one thousand nine hundred and forty-one (1941), for storage, use or consumption in this State at the rate of three per cent of the sales price of such property, regardless of whether said retailer is or is not engaged in business in this State.

Where a retail sales tax has already been paid with respect to said property in this State by the purchaser thereof, then the amount of said tax shall be credited

upon the tax imposed by this article.

Every person storing, using or otherwise consuming in this State tangible personal property purchased or received from a retailer either within or without this State shall be liable for the tax imposed by this article, and the liability shall not be extinguished until the tax has been paid to this State: Provided, however, that a receipt from a registered retailer engaged in business in this State given to the purchaser in accordance with the provisions of this article shall be prima facie sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer, and the liability of the purchaser shall be extinguished upon payment of the tax by any retailer from whom he has purchased said property.

The maximum tax imposed upon any single article of tangible personal property shall be limited as provided in § 105-168. (1939, c. 158, s. 802; 1941, c. 50,

s. 9.)

Sales Tax and Use Tax Are Complementary.—The use tax is not a sales tax. Its chief function is to prevent the evasion of the sales tax by persons purchasing tangi-

ble personal property outside of North Carolina for storage, use, or consumption within the State. Thus it prevents unfair competition on the part of out-of-state merchants. It and our sales tax law, G. S., ch. 105, art. 5, taken and applied together, provide a uniform tax upon either the sale or use of all tangible personal property irrespective of where it may be purchased.

That is, the sales tax and the use tax are complementary and functional parts of one system of taxation. Johnston v. Gill, 224 N. C. 638, 32 S. E. (2d) 30 (1944).

§ 105-221. Exemptions.—The storage, use or consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:

(a) Tangible personal property expressly specified and exempted from the re-

tail sales tax imposed by Schedule E, §§ 105-164 to 105-187.

(b) Tangible personal property, the sale of which is classified as a wholesale

sale under the provisions of Schedule E.

(c) Tangible personal property, the storage, use or consumption of which is exempt from taxation under the Constitution of North Carolina and the Constitution of the United States.

(d) Motor fuels defined and taxed in subchapter V, as now or hereafter amended or supplemented, and upon which the said gasoline tax has been paid.

- (e) Tangible personal property purchased or acquired prior to coming into this State and brought into this State by a person a nonresident thereof for his, her, its or their own use or enjoyment while temporarily in this State. (1939, c. 158, s. 803; 1941, c. 50, s. 9.)
- § 105-222. Registration.—Every retailer, engaged in business in this State, except those registered under Schedule E, §§ 105-164 to 105-187, who shall thereby be deemed to be registered under this article, selling or delivering tangible personal property for storage, use or consumption in this State shall within thirty days after July 1, 1941, register with the Commissioner and give the name and address of all agents operating in this State and the counties in this State in which they operate, the location of any and all distribution or sales houses or offices or other places of business in this State, the number, location and place of use of all motor vehicles, motorcycles, or other vehicles or conveyances, used or operated in this State by said retailer or in the business of said retailer, or for or under the authority of or under contract with or license from said retailer, and such other information as the Commissioner may require. (1939, c. 158, s. 804; 1941, c. 50, s. 9.)
- § 105-223. Retailer to collect tax from purchaser. Every retailer engaged in the business of selling, or delivering or taking orders for the sale or delivery of tangible personal property for storage, use, or consumption in this State shall at the time of selling or delivering or taking an order for the sale or delivery of said tangible personal property or collecting the sales price thereof, or any part thereof, add to the sales price of such tangible personal property the amount of the tax on the sale thereof, and when so added said tax shall constitute a part of such price, shall be a debt from the purchaser to the retailer until paid, and shall be recoverable at law in the same manner as other debts. Said tax shall be stated and charged separately from the sales price and shown separately on the retailer's sales records, and shall be paid by the purchaser to the retailer as trustee for and on account of the State, and the retailer shall be liable for the collection thereof and for its payment to the Commissioner, and the retailer's failure to charge to or collect said tax from the purchaser shall not affect such liability. It is the purpose and intent of this article that the tax herein levied and imposed shall be added to the sales price of tangible personal property when sold at retail and thereby be borne and passed on to the purchaser instead of being absorbed by the retailer.

Any retailer who shall by any character of public advertisement offer to absorb the tax levied in this article, or in any manner, directly or indirectly, advertise that the tax herein imposed is not considered as an element in the price to the purchaser, shall be guilty of a misdemeanor. Any violations of the provisions of this section reported to the Commissioner of Revenue shall be reported by him to the Attorney General of the State to the end that such violations may be brought to the attention of the solicitor of the court of the county or district whose duty it is to prosecute misdemeanors in the jurisdiction. It shall be the duty of such solicitor to investigate such alleged violations and if he finds that this section has

been violated, prosecute such violators in accordance with the law.

Every retailer engaged in business in this State, as defined in this article, shall collect said tax notwithstanding (a) that the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the retailer at a point outside of this State as a result of solicitation by the retailer through the medium of a catalog or other written advertisement, or (b) that the purchaser's order or the contract of sale is made or closed by acceptance or approval outside of this State or before said tangible personal property enters this State, or (c) that the purchaser's order or the contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this State and shipped directly to the purchaser from the point of origin, or (d) that said property is mailed to the purchaser in this State from a point outside this State or delivered to a carrier at a point outside this State, f. o. b., or otherwise, and directed to the purchaser in this State, regardless of whether the cost of transportation is paid by the retailer or by the purchaser, or (e) that said property is delivered directly to the purchaser at a point outside this State, if it is intended to be brought to this State for storage, use, or consumption in this State: Provided, that in the event of direct delivery to the purchaser at a point outside of this State the tax imposed by this article shall be credited with any retail sales tax lawfully imposed and paid with respect to said property in the State where such delivery occurred, or (f) any combination, in whole or in part, of any two or more of the foregoing statements of fact. (1939, c. 158, s. 805; 1941, c. 50, s. 9; c. 204, s. 1; 1945, c. 708, s. 9.)

Editor's Note.—The first 1941 amendment rewrote the article, and the second 1941 amendment changed the third paragraph of this section.

The 1945 amendment made the first sentence applicable to taking orders for sale or

delivery.

Soliciting Orders.—Where one is engaged within this State in a regular business of soliciting orders for tailor-made clothing

on commission, part of which he collects at the time the order is taken, and the clothes are shipped by the maker, who collects the balance of the price, directly from the purchaser, such transaction is subject to the use tax and the solicitor is a retailer and an agent for collecting the use tax, for which he is liable on his failure to do so. Johnston v. Gill, 224 N. C. 638, 32 S. E. (2d) 30 (1944).

§ 105-224. Taxes payable; when returns are to be filed by retailer.—The tax imposed by this article shall be due and payable to the Commissioner monthly on or before the fifteenth day of the month next succeeding the month in which the tax accrues. Every retailer engaged in business in this State shall, on or before the fifteenth day of the month following the month in which the tax accrues, file with the Commissioner a return for the preceding month, in such form as may be prescribed by the Commissioner, showing the total sales price of the tangible personal property sold and/or delivered by the retailer during such preceding month, the storage, use or consumption of which is subject to the tax imposed by this article, and such other information as the Commissioner may deem necessary for the proper administration of this article. The return shall be accompanied by a remittance of the amount of tax herein required to be paid by the retailer during the month covered by the return. Returns shall be signed by the retailer or his duly authorized agent but need not be verified by oath. (1939, c. 158, s. 807; 1941, c. 50, s. 9.)

§ 105-225. Taxes payable; when returns are to be filed by purchaser.—The Commissioner of Revenue shall have authority to require every person storing, using or consuming tangible personal property in this State to file

with the Commissioner a return for the preceding month in such form as may be prescribed by him showing the total sales price of the tangible personal property purchased or received by such person during such preceding month, the storage, use or consumption of which is subject to the tax imposed by this article, and such other information as the Commissioner may deem necessary for the proper administration of this article. The return shall be accompanied by a remittance of the amount of tax herein imposed during the month covered by the return. Returns shall be signed by the person liable for the tax or his duly authorized agent but need not be verified by oath.

No return or report shall be required under this section, however, of any person storing, using or consuming tangible personal property purchased from a registered retailer engaged in business in this State to whom said person has paid

the tax imposed by this article. (1939, c. 158, s. 808; 1941, c. 50, s. 9.)

§ 105-226. Sales presumed to be for storage, use or consumption. —For the purpose of the proper administration of this article and to prevent evasion of the tax and the duty to pay the same herein imposed, it shall be prima facie presumed that tangible personal property sold by any person for delivery in this State, however made and by carrier or otherwise, is sold for storage, use or other consumption in this State, and a like presumption shall apply to tangible personal property delivered without this State and brought to this State by the purchaser thereof. (1939, c. 158, s. 809; 1941, c. 50, s. 9.)

§ 105-227. Provisions of other articles applicable.—All provisions not inconsistent with this article in Schedule E, §§ 105-164 to 105-187, and Schedule J, §§ 105-229 to 105-269, relating to administration, auditing, and making returns, promulgation of rules and regulations by the Commissioner, imposition and collection of tax and the lien thereof, assessments, refunds, and penalties, are hereby made a part of this article and shall be applicable hereto. (1939, c. 158, s. 810; 1941, c. 50, s. 9.)

of a use or excise tax being subject to the same statute of limitations, which applies to the collection of the sales tax, a use or excise tax which accrued in the year 1937

Statute of Limitations.-The collection is barred by the three-year statute of limitations when assessed in 1942. Standard Fertilizer Co. v. Gill, 225 N. C. 426, 35 S. E. (2d) 275 (1945).

105-228. Failure to register and file returns misdemeanor.—Any retailer failing or refusing to register and give the information required in this article, and any retailer or other person failing or refusing to make any return required to be made under this article, or failing or refusing to make a supplemental return or to furnish other data or information required by the Commissioner, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars (\$500.00) for each such offense.

Any person required by this article to make, render or sign any return or report or to furnish other data or information, who makes any false or fraudulent return or report, or who furnishes any false data or information, with intent to defeat or evade the assessment or determination of any tax due under this article, shall be guilty of a misdemeanor, and shall for each such offense be fined not less than three hundred dollars (\$300.00) and not more than five thousand dollars (\$5,000.00) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court.

Any willful violation of the provisions of this article, except as otherwise herein provided, shall be a misdemeanor and punishable as such. (1939, c. 158, s.

811: 1941, c. 50, s. 9.)

ARTICLE 8A.

Schedule I-A. Gross Earnings Taxes in Lieu of Ad Valorem Taxes.

§ 105-228.1. Defining taxes levied and assessed in this article. —

The purpose of this article is to levy a fair and equal tax under authority of Article V, section three of the Constitution of North Carolina and to provide a practical means for ascertaining and collecting it. The taxes levied and assessed in this schedule shall be upon the gross earnings as defined in the article, and shall be in lieu of ad valorem taxes upon the properties of individuals, firms, or corporations so taxed herein. (1943, c. 400, s. 8.)

Editor's Note.—For comment on article, see 21 N. C. Law Rev. 364.

- § 105-228.2. Tax upon freight car line companies. (1) For purposes of taxation under this section the property of freight line companies as defined is declared to constitute a special class of property. In lieu of all ad valorem taxes by either or both the State government and the respective local taxing jurisdictions, a tax upon gross earnings in the State as elsewhere defined shall be imposed.
- (2) Any person or persons, joint-stock association or corporation, wherever organized or incorporated, engaged in the business of operating cars or engaged in the business of furnishing or leasing cars not otherwise listed for taxation in this State, for the transportation of freight (whether such cars be owned by such company or any other person or company), over any railway or lines, in whole or in part, within this State, such line or lines not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture, or refrigerator car or by some other name, shall be deemed a freight line company.
- (3) For the purposes of taxation under this section all cars used exclusively within the State, or used partially within and without the State, and a proportionate part of the intangible values of the business as a going concern, are hereby declared to have situs in this State.
- (4) Every freight line company, as hereinbefore defined, shall pay annually a sum in the nature of a tax at three per centum upon the total gross earnings received from all sources by such freight line companies within the State, which shall be in lieu of all ad valorem taxes in this State of any freight company so paying the same.
- (5) The term "gross earnings received from all sources by such freight line companies within the State" as used in this article is hereby declared and shall be construed to mean all earnings from the operation of freight cars within the State for all car movements or business beginning and ending within the State and a proportion, based upon the proportion of car mileage within the State to the total car mileage, or earnings on all interstate car movements or business passing through, or into or out of the State.
- (6) Every railroad company using or leasing the cars of any freight line company shall, upon making payment to such freight line company for the use or lease, after June thirtieth, one thousand nine hundred and forty-three, of such cars withhold so much thereof as is designated in this section. On or before March first of each year such railroad company shall make and file with the Commissioner of Revenue a statement showing the amount of such payment for the next preceding twelve-month period ending December thirty-first, and of the amounts so withheld by it, and shall remit to the Commissioner of Revenue the amounts so withheld. If any railroad company shall fail to make such report or fail to remit the amount of tax herein levied, or shall fail to withhold the part of such payment hereby required to be withheld, such railroad company shall become liable for the amount of the tax herein levied and shall not be entitled to deduct from its gross earnings for purposes of taxation the amounts so paid by it to freight line companies.

It is not the purpose of this subdivision to impose an unreasonable burden of accounting on railroad companies operating in this State, and the Commissioner of Revenue is hereby authorized, upon the application of any railroad company, to

approve any method of accounting which he finds to be reasonably adequate for determining the amount of mileage earnings by any car line company whose equipment is operated within the State by or on the lines of such railroad company. Further, if in the opinion of the Revenue Commissioner the tax imposed by this section can be satisfactorily collected direct from the freight line companies, he is hereby authorized to fix rules and regulations for such direct collection, with the authority to return at any time to the method of collection at source above provided in this subdivision.

(7) Every car line company shall file such additional reports annually, and in such form and as of such date as the Commissioner of Revenue may deem neces-

sary to determine the equitable amount of tax levied under this section.

(8) Upon the filing of such reports it shall be the duty of the Commissioner of Revenue to inspect and verify the same and assess the amount of taxes due from freight line companies therein named. Any freight line company against which a tax is assessed under the provisions of this article may at any time within fifteen days after the last day for the filing of reports by railroad companies, appear before the Commissioner of Revenue at a hearing to be granted by the Commissioner and offer evidence and argument on any matter bearing upon the validity or correctness of the tax assessed against it, and the Commissioner shall review his assessment of such tax and shall make his order confirming or modifying the same as he shall deem just and equitable, and if any overpayment is found to have been made it shall be refunded by the Commissioner.

(9) If any such freight line company or railroad company shall fail to pay the tax levied herein when due a penalty of ten (10%) per cent thereof shall immediately accrue and thereafter one (1%) per cent per month shall be added to such tax and penalty while such tax remains unpaid. All provisions of laws for enforcing payment of taxes levied in this article shall be applicable to the gross earnings taxes of freight line companies. Any freight line company against which a tax is assessed under the provisions of this article may appear and defend in any action

brought for the collection of such tax.

(10) The provisions of this article shall apply to all freight line gross earnings accruing from and after June thirtieth, one thousand nine hundred and forty-three, (1943, c. 400, s. 8.)

ARTICLE 8B.

Schedule I-B. Taxes upon Insurance Companies.

§ 105-228.3. To whom this article shall apply.—The provisions of this article shall apply to every person, firm, corporation, association, society, or order operating in this State, hereinafter to be referred to as insurance company, which contracts or offers on his, their, or its account to issue any policy or contract for annuities or insurance as defined in § 58-3, or to exchange or issue reciprocal or interinsurance contracts, or to function as a rate making bureau or association, or to serve as an underwriters agency. Said provisions shall likewise apply to any person, firm or corporation who or which shall be a broker, organizer, manager, or agent, whether local, special or general, of any insurance company, and to self-insurers under the provisions of the Workmen's Compensation Act. (1945, c. 752, s. 2.)

Editor's Note.—The act inserting this article and making other changes in the chapter provides that, unless otherwise expressly provided, its provisions shall be in

effect as to all fees and taxes affected hereby which shall become due and payable after March 15, 1945.

§ 105-228.4. Annual registration fees for insurance companies.— Each and every insurance company shall, as a condition precedent for doing business in this State, between March sixteenth and the first day of April in one thousand nine hundred and forty-five and on or before April first of each year

thereafter apply for and obtain from the Commissioner of Insurance a certificate of registration, or license, and shall pay for such certificate the following annual fees except as hereinafter provided in subdivisions (a) and (b):

For each domestic farmer's mutual assessment fire insurance company or association, and each branch thereof \$10.00 For each fraternal order \$25.00 For each of all other insurance companies, except mutual burial associations taxed under § 105-121.1 300.00

The fees levied above shall be in addition to those specified in § 58-63.

(a) When the paid in capital stock and/or surplus of an insurance company other than a farmer's mutual assessment company or a fraternal order does not exceed one hundred thousand dollars (\$100,000.00), the fee levied in this section

shall be one-half the amount above specified.

(b) Upon payment of the fee specified above and the fees and taxes elsewhere specified each insurance company, exchange, bureau, or agency, shall be entitled to do the types of business specified in chapter fifty-eight, of the General Statutes of North Carolina as amended, to the extent authorized therein, except that: Insurance companies authorized to do either the types of business specified for (A) life insurance companies, or (B) for fire and marine companies, or (C) for casualty and fidelity and surety companies, in § 58-77, which shall also do the types of business authorized in one or both of the other of the above classifications shall in addition to the fees above specified pay one hundred dollars (\$100.00) for each such additional classification of business done.

(c) Any rating bureau established by action of the General Assembly of North Carolina shall be exempt from the fees above levied. (1945, c. 752, s. 2; 1947, c.

501, s. 8.)

Editor's Note.—The 1947 amendment inserted "domestic" in line seven of this section, and substituted in line eight the words "and each branch thereof" for the words "operating in not more than five counties."

§ 105-228.5. Taxes measured by gross premiums.—Each and every insurance company shall annually pay to the Commissioner of Insurance at the time and at the rates hereinafter specified, a tax measured by gross premiums as hereinafter defined from business done in this State during the preceding calendar

vear.

Gross premiums from business done in this State in the case of life insurance and annuity contracts, including any supplemental contracts thereto providing for disability benefits, accidental death benefits, or other special benefits, shall for the purposes of the taxes levied in this section mean any and all premiums collected in the calendar year (other than for contracts for reinsurance) for policies the premiums on which are paid by or credited to persons, firms or corporations resident in this State, or in the case of group policies for any contracts of insurance covering persons resident within this State, with no deduction for considerations paid for annuity contracts which are subsequently returned except as below specified, and with no other deduction whatsoever except for premiums returned under one or more of the following conditions: premiums refunded on policies rescinded for fraud or other breach of contract; premiums which were paid in advance on life insurance contracts and subsequently refunded to the insured, premium payer, beneficiary or estate; and in the case of group annuity contracts the premiums returned by reason of a change in the composition of the group covered. Said gross premiums shall be deemed to have been collected for the amounts as provided in the policy contracts for the time in force during the year, whether satisfied by cash payment, notes, loans, automatic premium loans, applied dividend or in any other manner whatsoever, except in the case of premiums waived by any of said companies pursuant to a contract for waiver of premium in case of disability.

Gross premiums from business done in this State in the case of contracts for fire insurance, casualty insurance, and any other type of insurance except life and annuity contracts as above specified, including contracts of insurance required to be carried by the Workmen's Compensation Act, shall for the purposes of the taxes levied in this section mean any and all premiums written during the calendar year, or the equivalent thereof in the case of self-insurers under the Workmen's Compensation Act, for contracts covering property or risks in this State, other than for contracts of reinsurance, whether such premiums are designated as premiums, deposits, premium deposits, policy fees, membership fees, or assessments. Gross premiums shall be deemed to have been written for the amounts as provided in the policy contracts, new and renewal, becoming effective during the vear irrespective of the time or method of making payment or settlement for such premiums, and with no deduction for dividends whether returned in cash or allowed in payment or reduction of premiums or for additional insurance, and without any other deduction except for return of premiums, deposits, fees or assessments for adjustment of policy rates or for cancellation or surrender of policies.

In determining the amount of gross premiums from business in this State all gross premiums received in this State, or credited to policies written or procured in this State, or derived from business written in this State shall be deemed to be for contracts covering persons, property or risks resident or located in this State except for such premiums as are properly reported and properly allocated as being received from business done in some other nation, territory, state or states, and except for premiums from policies written in federal areas for persons in military service who pay premiums by assignment of service pay.

On the basis of the gross amount of premiums, as above defined, each company or self-insurer shall pay as to:

The amounts collected on contracts applicable to liabilities under the Workmen's Compensation Act, or the equivalent thereof in the case of self-insurers, a tax of four per cent (4%).

The amounts collected on annuities and all other contracts of insurance a tax at the rate of one per cent (1%) in the case of domestic companies and at the rate of two and one-half per cent $(2\frac{1}{2}\%)$ in the case of foreign and alien companies.

The taxes levied herein measured by premiums shall be in lieu of all other taxes upon insurance companies except: fees and licenses under this article, or as specified in chapter 58 of the General Statutes of North Carolina as amended; taxes imposed by chapter 118 of the General Statutes of North Carolina; and ad valorem taxes upon real property and personal property owned in this State.

For the tax above levied as measured by gross premiums the president, secretary, or other executive officer of each insurance company doing business in this State shall within the first fifteen days of March in 1946 and in each year thereafter file with the Commissioner of Insurance a full and accurate report of the total gross premiums as above defined collected in this State during the preceding calendar year. The report shall be in such form and contain such information as the Commissioner of Insurance may specify, and the report shall be verified by the oath of the company official transmitting the same or by some principal officer at the home or head office of the company or association in this country. At the time of making such report the taxes above levied with respect to the gross premiums shall be paid to the Commissioner of Insurance. The provisions above shall likewise apply as to reports and taxes for any firm, corporation, or association exchanging reciprocal or interinsurance contracts, and said reports and taxes shall be transmitted by their attorneys in fact.

The provisions as to reports and taxes as measured by gross premiums shall not apply to farmers' mutual assessment fire insurance companies above specified

or to fraternal orders or societies that do not operate for a profit and do not issue

policies on any person except members.

With respect to the taxes levied in this section on the equivalent of premiums of self-insurers under the provisions of the Workmen's Compensation Act, the reports required herein shall be transmitted to and the taxes collected by the North Carolina Industrial Commission as provided in subdivision (j) of § 97-100 of the General Statutes of North Carolina. (1945, c. 752, s. 2; 1947, c. 501, s. 8.)

Editor's Note. - The 1947 amendment struck out the former first paragraph and inserted in lieu thereof the first four paragraphs. It also added the last paragraph. It further struck out of the seventh paragraph the words "of two per cent (2%)" and inserted in lieu thereof the present provision as to rates. As to the last mentioned change, the amendatory act provided (1) that it should apply only to gross premiums collected in the State during 1947 and succeeding calendar years; and (2) that if such change be judicially declared invalid the provisions of law existing immediately prior to such change shall have the same force and effect as if such change had not been enacted.

For discussion of the 1947 amendment, see 25 N. C. Law Rev. 471.

Former Law—Validity.—The license tax imposed by a former statute upon the gross receipts of insurance companies on business written within the borders of our State was held not in contravention of the Fourteenth Amendment to the Constitution of the

United States, as to due process and equal protection of the law, nor a burden upon interstate commerce, being restricted to intrastate commerce, and not extending beyond the boundaries of the State. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568 (1916).

Same—Nature of Tax.—A tax imposed by a former statute upon the gross earnings of foreign life insurance companies doing business within this State, derived within this State, was a license or occupation tax. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568 (1916).

A tax on the gross receipts of an insurance company is a privilege tax. Insurance Co. v. Stedman, 130 N. C. 221, 41 S. E. 279 (1902).

Same—Gross Receipts from Business Done in State.—The former tax on gross receipts applied to all receipts from business done in the State, whether the money was paid here or forwarded to the main office. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568 (1916).

- § 105-228.6. Taxes in case of withdrawal from State.—Any insurance company which for any cause withdraws from this State or ceases to register and transact new business in this State shall be liable for the taxes specified in § 105-228.5 with respect to gross premiums collected in the calendar year in which such withdrawal may occur. In case any company which was formerly licensed or registered in this State and which subsequently ceased to do business therein, may apply to re-enter this State, application for re-entry or renewal of registration shall be denied unless and until said company shall have paid all taxes, together with any penalties and interest, due as to premiums collected in the year of withdrawal and also taxes as specified in § 105-228.5 for gross premiums collected in the calendar year next preceding the year in which such application for renewal of registration is made. (1945, c. 752, s. 2.)
- § 105-228.7. Registration fees for agents, brokers and others.— Each and every manager, organizer, independent adjuster, adjuster, broker or agent of whatever kind representing in this State any company referred to in this article, shall on or before the first day of April of each year apply for and obtain from the Commissioner of Insurance an annual certificate of registration, or license, and shall pay for said certificate an annual fee at the following rates, with no additional fee for affixing of seal to the certificate:

Insurance agent (local), for each company represented	\$	2.50
General agent or manager, for each company represented		6.00
Special agent or organizer, for each company represented		5.00
Insurance adjuster, for each company represented		3.00
Insurance broker		2.50
Independent adjuster	10	00.00
Nonresident broker		10.00

The above fees shall be in lieu of any and all other licenses fees.

In cases where temporary license may be issued pursuant to law the fee for a temporary certificate shall be at the same rates as above specified, and any amounts so paid for temporary license may be credited against the fees required for issuance of the annual license or certificate.

Any person not registered who is required by law to pass examination as a condition for securing of license shall upon application for registration pay to the Commissioner of Insurance an examination fee of ten dollars (\$10.00), and in case more than two examinations in any one kind of insurance are requested, an additional fee of ten dollars (\$10.00) shall be paid for each added examination above two for the same kind of insurance. The requirement for examination and examination fee shall not apply to agents for domestic farmers' mutual assessment fire insurance companies or associations specified in § 105-228.4.

In the event a certificate issued under this section is lost or destroyed the Commissioner of Insurance for a fee of fifty cents (\$0.50) may certify to its issuance, giving number, date, and form, which may be used by the original party named thereon in lieu of the annual certificate. There shall be no charge for the seal attached to such certification. (1945, c. 752, s. 2; 1947, c. 1023, s. 2; 1949, c. 958,

s. 2.)

Editor's Note.—The 1947 amendment rewrote all of this section except the last paragraph. The 1949 amendment inserted "independent adjuster" near the beginning of the section, struck out the words "for each company represented in the State"

formerly appearing after the words "annual fee" near the end of the first paragraph, made changes in the list of fees and added the provision that such fees "shall be in lieu of any and all other license fees."

- § 105-228.8. Uniformity of taxes. No fees or taxes imposed in this article shall be increased on account of any retaliatory law now in effect in this or any other state, but such fees and taxes shall apply to all insurance companies alike, as specified in this article, without regard to state, territory or country or domicile or location of home office, and without regard to any fees or taxes which may be levied by any jurisdiction in which any company may be domiciled or have its home office. (1945, c. 752, s. 2.)
- § 105-228.9. Powers of the Commissioner of Insurance. All provisions of this chapter, not inconsistent with this article, relating to administration, auditing and making returns, promulgation of rules and regulations, the imposition and collection of tax, and the lien thereof, assessments, refunds and penalties, shall be applicable to the fees and taxes imposed in this article; and with respect thereto, the Commissioner of Insurance is hereby given the same power and authority as is given to the Commissioner of Revenue under the provision of this chapter. (1945, c. 752, s. 2.)
- § 105-228.10. No additional local taxes.—No county, city, or town shall be allowed to impose any additional tax, license, or fee, other than ad valorem taxes, upon any insurance company or association paying the fees and taxes levied in this article. (1945, c. 752, s. 2.)

ARTICLE 9.

Schedule J. General Administration-Penalties and Remedies.

§ 105-229. Failure of person, firm, corporation, public utility and/or public service corporation to file report.—If any person, firm, or corporation required to file a report under any of the provisions of Schedules B and C of this subchapter fails, refuses, or neglects to make such report as required herein within the time limited in said schedule for making such report he or it shall pay a penalty of ten dollars (\$10.00) for each day's omission. (1939, c. 158, s. 900.)

- § 105-230. Charter canceled for failure to report.—If a corporation required by the provisions of this subchapter to file any report or return or to pay any tax or fee, either as a public utility (not as an agency of interstate commerce) or as a corporation incorporated under the laws of this State, or as a foreign corporation domesticated in or doing business in this State, or owning and using a part or all of its capital or plant in this State, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this subchapter for making such report or return, or for paying such tax or fee, the Commissioner of Revenue shall certify such fact to the Secretary of State. The Secretary of State shall thereupon suspend the articles of incorporation of any such corporation which is incorporated under the laws of this State by appropriate entry upon the records of his office, or suspend the certificate of authority of any such foreign corporation to do business in this State by proper entry. Thereupon all the powers, privileges, and franchises conferred upon such corporation by such articles of incorporation or by such certificate of authority shall cease and determine. The Secretary of State shall immediately notify by registered mail every such domestic or foreign corporation of the action taken by him, and also shall immediately certify such suspension to the clerk of superior court of the county in which the principal office or place of business of such corporation is located in this State with instructions to said clerk, and it shall be the clerk's duty, to make appropriate entry upon the records of his office indicating suspension of the corporate powers of the corporation in question. (1939, c. 158, s. 901.)
- § 105-231. Penalty for exercising corporate functions after cancellation or suspension of charter. — Any person, persons or corporations who shall exercise or by any act attempt to exercise any powers, privileges, or franchises under articles of incorporation or certificate of authority after the same are suspended, as provided in any section of this subchapter, shall pay a penalty of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00), to be recovered in an action to be brought by the Commissioner of Revenue in the superior court of Wake County. Any corporate act performed or attempted to be performed during the period of such suspension shall be invalid and of no effect. (1939, c. 158, s. 902.)
- § 105-232. Corporate rights restored.—Any corporation whose articles of incorporation or certificate of authority to do business in this State has been suspended by the Secretary of State, as provided in § 105-230, or similar provisions of prior Revenue Acts, upon the filing, within five years after such suspension or cancellation under previous acts, with the Secretary of State, of a certificate from the Commissioner of Revenue that it has complied with all the requirements of this subchapter and paid all State taxes, fees, or penalties due from it (which total amount due may be computed, for years prior and subsequent to said suspension or cancellation, in the same manner as if said suspension or cancellation had not taken place), shall be entitled to exercise again its rights, privileges, and franchises in this State; and the Secretary of State shall cancel the entry made by him under the provisions of § 105-230 or similar provisions of prior Revenue Acts, and shall issue his certificate entitling such corporation to exercise again its rights, privileges, and franchises, and certify such reinstatement to the clerk of superior court in the county in which the principal office or place of business of such corporation is located with instructions to said clerk, and it shall be his duty to cancel from his records the entry showing suspension of corporate privileges. (1939, c. 158, s. 903; c. 370, s. 1; 1943, c. 400, s. 9; 1947, c. 501, s. 9.)

Editor's Note.—The 1947 amendment struck out the words and figures "and upsubstituted "five years" for "ten years" on payment to the Commissioner of Rev-

near the beginning of the section. It also enue, to be transferred to the Secretary of

State, of an additional penalty of ten dollars (\$10.00) to cover the cost of reinstatement," which formerly immediately fol-

lowed the parentheses near the middle of the section. Part of the stricken matter had been inserted by the 1943 amendment.

- § 105-233. Officers, agents, and employees; misdemeanor failing to comply with tax law.—If any officer, agent, and/or employee of any person, firm, or corporation subject to the provisions of this subchapter shall willfully fail, refuse, or neglect to make out, file, and/or deliver any reports or blanks, as required by such law, or to answer any question therein propounded, or to knowingly and willfully give a false answer to any such question wherein the fact inquired of is within his knowledge, or upon proper demand to exhibit to such Commissioner of Revenue or any of his duly authorized representatives any book, paper, account, record, memorandum of such person, firm, or corporation in his possession and/or under his control, he shall be guilty of a misdemeanor and fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) for each offense. (1939, c. 158, s. 904.)
- § 105-234. Aiding and/or abetting officers, agents, or employees in violation of this subchapter a misdemeanor.—If any person, firm, or corporation shall aid, abet, direct, cause or procure any of his or its officers, agents, or employees to violate any of the provisions of this subchapter, he or it shall be guilty of a misdemeanor, and fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) for each offense. (1939, c. 158, s. 905.)
- § 105-235. Every day's failure a separate offense.—The willful failure, refusal, or neglect to observe and comply with any order, direction, or mandate of the Commissioner of Revenue, or to perform any duty enjoined by this subchapter, by any person, firm, or corporation subject to the provisions of this subchapter, or any officer, agent, or employee thereof, shall, for each day such failure, refusal, or neglect continues, constitute a separate and distinct offense. (1939, c. 158, s. 906.)
- § 105-236. Penalty for bad checks.—When any uncertified check is tendered in payment of any obligation to the Department of Revenue, and such check shall have been returned to the office of the Commissioner of Revenue unpaid on account of insufficient funds of the drawer of said check in the bank upon which same is drawn, then and in that event an additional tax shall be imposed equal to ten per cent (10%) of the tax due; and in no case shall the increase of said tax because of such failure be less than one dollar (\$1.00) nor exceeding two hundred dollars (\$200.00), and the said additional tax shall not be waived or diminished by the Commissioner of Revenue. This section shall apply to all taxes levied or assessed by the State. (1939, c. 158, s. 907.)
- § 105-237. Discretion of Commissioner over penalties.—The Commissioner of Revenue shall have power, upon making a record of his reasons therefor, to reduce or waive any penalties provided for in this subchapter, except the penalty provided in § 105-236 relating to unpaid checks. (1939, c. 158, s. 908; c. 370, s. 1.)
- § 105-238. Tax a debt. Every tax imposed by this subchapter, and all increases, interest, and penalties thereon, shall become, from the time it is due and payable, a debt from the person, firm, or corporation liable to pay the same to the State of North Carolina. (1939, c. 158, s. 909.)

For prior law see Gatling v. Commissioners v. Hall, 177 N. C. 490, 99 sioners, 92 N. C. 536 (1885); Worth v. Wright, 122 N. C. 335, 29 S. E. 361 (1898);

§ 105-239. Action for recovery of taxes. — Action may be brought at

any time and in any court of competent jurisdiction in this State or other state, in the name of the State and at the instance of the Commissioner of Revenue, to recover the amount of any taxes, penalties, and interest due under this subchapter. This remedy is in addition to all other remedies for the collection of said taxes and shall not in any respect abridge the same. Any judgment shall be declared to have such preference and priority against the property of the defendant as is provided by law for taxes levied by this subchapter, and free from any claims for homestead or personal property exemption of the defendant therein. (1939, c. 158, s. 910.)

§ 105-240. Tax upon settlement of fiduciary's account. — No final account of a fiduciary shall be allowed by the probate court unless such account shows, and the judge of said court finds, that all taxes imposed by the provisions of this subchapter upon said fiduciary, which have become payable, have been paid, and that all taxes which may become due are secured by bond, deposit, or otherwise. The certificate of the Commissioner of Revenue and the receipt for the amount of tax herein certified shall be conclusive as to the payment of the tax to the extent of said certificate.

For the purpose of facilitating the settlement and distribution of estates held by fiduciaries, the Commissioner of Revenue, with the approval of the Attorney General, may, on behalf of the State, agree upon the amount of taxes at any time due or to become due from such fiduciaries under the provisions of this subchapter, and the payment in accordance with such agreement shall be full satisfaction of the taxes to which the agreement relates. (1939, c. 158, s. 911.)

§ 105-241. Taxes payable in national currency; for what period, and when a lien; priorities.—The taxes herein designated and levied shall be payable in the existing national currency. State, county, and municipal taxes levied for any and all purposes pursuant to this subchapter shall be for the fiscal year of the State in which they become due, except as otherwise provided, and the lien of such taxes shall attach annually to all real estate of the taxpayer within the State on the date that such taxes are due and payable, and said lien shall continue until such taxes, with any interest, penalty, and costs which shall accrue thereon, shall have been paid; in the settlement of the estate of any decedent where, by any order of court or other proceeding, the real estate of the decedent has been sold to make assets to pay debts, such sale shall not have the effect of extinguishing the lien upon the land so sold for State taxes, nor shall the same be postponed in any manner to the payment of any other claim or debt against the estate, save funeral expenses and cost of administration.

Provided, however, that the lien of State taxes shall not be enforceable as against bona fide purchasers for value, and as against duly recorded mortgages, deeds of trust and other recorded specific liens, as to real estate, except upon docketing of a certificate of tax liability or a judgment in the office of the clerk of the superior court of the county wherein the real estate is situated, and as to personalty, except upon a levy upon such property under an execution or a tax warrant, and the priority of the State's tax lien against property in the hands of bona fide purchasers for value, and as against duly recorded mortgages, deeds of trust and other recorded specific liens, shall be determined by reference to the date and time of the docketing of judgment or certificate of tax liability or the levy under execution or tax warrant. Provided further, that in the event any taxpayer shall execute an assignment for the benefit of creditors, or if receivership, a creditor's bill or other insolvency proceedings are instituted against any taxpayer indebted to the State on account of any taxes levied by the State, the lien of State taxes shall attach to any and all property of such taxpayer or of such insolvent's estate as of the date and time of the execution of the assignment for the benefit of creditors or of the institution of proceedings herein mentioned and shall be subject only to prior recorded specific liens and reasonable

costs of administration. Notwithstanding the provisions of this paragraph, the provisions contained in \$ 105-174 and \$ 105-176 shall remain in full force and

effect with respect to the lien of sales taxes.

The provisions of this section shall not have the effect of releasing any lien for State taxes imposed by other law, nor shall they have the effect of postponing the payment of the said State taxes or depriving the said State taxes of any priority in order of payment provided in any other statute under which payment of the said taxes may be required. (1939, c. 158, s. 912; 1949, c. 392, s. 6.)

wrote the second paragraph. For brief comment on the amendment, see 27 N. C. Law Rev. 485.

Fiscal Year and Tax Year. - Welding this and § 153-114 together by established rules of correct interpretation, the fiscal year and the tax year are coterminous and

Editor's Note.—The 1949 amendment re- coincident, and the liability of the landowner for taxes for any year arises and begins on July 1 of that year. State v. Champion Fibre Co., 204 N. C. 295, 168 S. E. 207 (1933).

Applied in Winston-Salem v. Powell Paving Co., 7 F. Supp. 424 (1934).

§ 105-241.1. Additional taxes; assessment procedure.—If the Commissioner of Revenue discovers from the examination of any return or otherwise that any tax or additional tax is due from any taxpayer, he may, at any time within three years of the date the tax or additional tax was due to be paid, where a proper application for a license or a return has been filed, or within five years where no proper application for a license or no return has been filed, notify the taxpaver in writing by mail the kind and amount of tax which is being assessed against him, and thereupon such tax or additional tax shall become due and collectible as in the case of other taxes due the State, together with any interest and penalties applicable to such tax.

If the Commissioner is unable to obtain from the taxpayer information deemed by him to be adequate and reliable upon which to base such assessment, the assessment may be made upon the basis of the best information available and, subject to the provisions hereinafter made, such assessment shall be deemed correct.

Any taxpayer feeling aggrieved by such assessment shall be entitled to a hearing before the Commissioner of Revenue upon making application therefor in writing within thirty days after the receipt of notice of the assessment. Such application shall set out in detail the taxpayer's objections to the assessment. If no application for a hearing is made within thirty days after notice of assessment is given, the assessment shall be final and conclusive. If application for a hearing is made in due time, the Commissioner shall set a time and place for such hearing and after considering the taxpayer's objections shall give written notice of his decision to the taxpayer. The amount of the assessment as finally determined by the Commissioner shall become immediately due and collectible.

The provisions of §§ 105-162 and 105-163 of the General Statutes shall be applicable to the tax so assessed, or the taxpayer may, at his option, pay the tax so assessed under protest and institute a suit to recover such tax in accordance

with the provisions of § 105-267 of the General Statutes.

This section is in addition to and not in substitution of any other provision of this article relative to the assessment and collection of taxes, and shall not be construed as repealing any other provision of this article. (1949, c. 392, s. 6.)

§ 105-242. Warrant for the collection of taxes; certificate or judgment for taxes.—1. If any tax imposed by this subchapter, or any other tax levied by the State and payable to the Commissioner of Revenue, or any portion of such tax be not paid within thirty days after the same becomes due and payable, and after the same has been assessed, the Commissioner of Revenue shall issue an order under his hand and official seal, directed to the sheriff of any county of the State, commanding him to levy upon and sell the real and personal property of the taxpayer found within his county for the payment of the amount thereof, with the added penalties, additional taxes, interest, and cost of executing the same, and to return to the Commissioner of Revenue the money collected by virtue thereof within a time to be therein specified, not less than sixty days from the date of the order. The said sheriff shall, thereupon, proceed upon the same in all respects with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the order, to be collected in the same manner.

- 2. Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, hereinafter called the intangible, belonging, owing, or to become due to any taxpayer subject to any of the provisions of this subchapter, or which has been transferred by such taxpayer under circumstances which would permit it to be levied upon if it were tangible, shall be subject to attachment or garnishment as herein provided, and the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this subchapter to the extent of the amount of the intangible belonging, owing, or to become due to the taxpayer subject to the set-off of any matured or unmatured indebtedness of the taxpayer to the garnishee. To effect such attachment or garnishment the Commissioner of Revenue shall serve or cause to be served upon the taxpayer and the garnishee a notice as hereinafter provided, which notice may be served by any deputy or employee of the Commissioner of Revenue or by any officer having authority to serve summonses. Said notice shall show:
 - (1) The name of the taxpayer and his address, if known;

(2) The nature and amount of the tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and

(3) Shall be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:

If the garnishee has no defense to offer or no set-off against the taxpayer, he shall, within ten days after service of said notice, answer the same by sending to the Commissioner of Revenue by registered mail a statement to that effect, and if the amount due or belonging to the taxpayer is then due or subject to his demand, it shall be remitted to the Commissioner with said statement, but if said amount is to mature in the future, the statement shall set forth that fact and the same shall be paid to the Commissioner upon maturity, and any payment by the garnishee hereunder shall be a complete extinguishment of any liability therefor on his part to the taxpayer. If the garnishee has any defense or set-off, he shall state the same in writing under oath, and, within ten days after service of said notice, shall send two copies of said statement to the Commissioner by registered mail; if the Commissioner admits such defense or set-off, he shall so advise the garnishee in writing within ten days after receipt of such statement and the attachment or garnishment shall thereupon be discharged to the amount required by such defense or set-off, and any amount attached or garnished hereunder which is not affected by such defense or set-off shall be remitted to the Commissioner as above provided in cases where the garnishee has no defense or setoff, and with like effect. If the Commissioner shall not admit the defense or set-off, he shall set forth in writing his objections thereto and shall send a copy thereof to the garnishee within ten days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time he shall file a copy of said notice, a copy of the garnishee's statement, and a copy of his objections thereto in the superior court of the county where the garnishee resides or does business where the issues made shall be tried as in

If judgment is entered in favor of the Commissioner of Revenue by default or after hearing, the garnishee shall become liable for the taxes, interest and penalties due by the taxpayer to the extent of the amount over and above any de-

fense or set-off of the garnishee belonging, owing, or to become due to the taxpayer, but payments shall not be required from amounts which are to become due to the taxpayer until the maturity thereof, nor shall more than ten per cent of any taxpaver's salary or wages be required to be paid hereunder in any one The garnishee may satisfy said judgment upon paying said amount, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered upon such hearing either the Commissioner of Revenue or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of said taxes, interest, penalties, and costs, the attachment or garnishment may be released or execution staved pending appeal, but the final judgment shall be paid or enforced as above provided. The taxpayer's sale remedies to question his liability for said taxes, interest, and penalties shall be those provided in this subchapter, as now or hereafter amended or supplemented. If any third person claims any intangible attached or garnished hereunder and his lawful right thereto, or to any part thereof, is shown to the Commissioner, he shall discharge the attachment or garnishment to the extent necessary to protect such right, and if such right is asserted after the filing of said copies as aforesaid, it may be established by interpleader as now or hereafter provided by law in cases of attachment and garnishment. In case such third party has no notice of proceedings hereunder, he shall have the right to file his petition under oath with the Commissioner at any time within twelve months after said intangible is paid to him and if the Commissioner finds that such party is lawfully entitled thereto or to any part thereof, he shall pay the same to such party as provided for refunds by § 105-407, and if such payment is denied, said party may appeal from the determination of the Commissioner to the superior court of Wake County or to the superior court of the county wherein he resides or does business and the provisions of § 105-163 shall apply on such appeal. The intangibles of a taxpayer shall be paid or collected hereunder only to the extent necessary to satisfy said taxes, interest, penalties, and costs. Except as hereinafter set forth, the remedy provided in this section shall not be resorted to unless a warrant for collection or execution against the taxpayer has been returned unsatisfied: Provided, however, if the Commissioner is of opinion that the only effective remedy is that herein provided, it shall not be necessary that a warrant for collection or execution shall be first returned unsatisfied, and in no case shall it be a defense to the remedy herein provided that a warrant for collection or execution has not been first returned unsatisfied: Provided, however, that no salary or wage at the rate of less than two hundred dollars (\$200.00) per month, whether paid weekly or monthly, shall be attached or garnished under the provisions of this section.

3. In addition to the remedy herein provided, the Commissioner of Revenue is authorized and empowered to make a certificate setting forth the essential particulars relating to the said tax, including the amount thereof, the date when the same was due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and index the same on the cross index of judgments, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court (said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and on personalty only from the date of the levy on such personalty and upon the execution thereon no homestead or personal property exemption shall be allowed).

A certificate or judgment in favor of the State or the Commissioner of Revenue for taxes payable to the Department of Revenue, whether docketed before or after the effective date of this paragraph, shall be valid and enforceable for

a period of ten years from the date of docketing. When any such certificate or judgment, whether docketed before or after the effective date of this paragraph, remains unsatisfied for ten years from the date of its docketing, the same shall be unenforceable and the tax represented thereby shall abate. Upon the expiration of said ten-year period, the Commissioner of Revenue or his duly authorized deputy shall cancel of record said certificate or judgment. Any such certificate or judgment now on record which has been docketed for more than ten years shall, upon the request of any interested party, be canceled of record by the Commissioner of Revenue or his duly authorized deputy.

4. The remedies herein given are cumulative and in addition to all other remedies provided by law for the collection of said taxes. (1939, c. 158, s. 913;

1941, c. 50, s. 10; 1949, c. 392, s. 6.)

Cross Reference.—As to interpleader in cases of attachment and garnishment, see § 1-471.

Editor's Note.—The 1941 amendment inserted subsection 2, and the 1949 amendment added the second paragraph to subsection 3.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 541; on the 1949 amendment, see 27 N. C. Law Rev. 485.

Garnishee Held Liable for Costs.—Where the Commissioner of Revenue has garnisheed a bank deposit for taxes due by the depositor, and the garnishee bank, in refusing to comply with the order, asserts no defense or set-off against the taxpayer, the bank, in the Commissioner's action to compel compliance, will be held liable also for the costs. Gill v. Bank of French Board, 230 N. C. 118, 52 S. E. (2d) 4 (1949).

§ 105-243. Taxes recoverable by action.—Upon the failure of any corporation to pay the taxes, fees, and penalties prescribed by this subchapter, the Commissioner of Revenue may certify same to the sheriff of the county in which such company may own property, for collection as provided in this subchapter; and if collection is not made, such taxes or fees and penalties thereon may be recovered in an action in the name of the State, which may be brought in the superior court of Wake County, or in any county in which such corporation is doing business, or any county in which such corporation owns property. The Attorney General, on request of the Commissioner of Revenue, shall institute such action in the superior court of Wake County, or of any such county as the Commissioner of Revenue may direct. In any such action it shall be sufficient to allege that the tax, fee, or penalty sought to be recovered is delinquent, and that the same has been unpaid for the period of thirty days after due date. (1939, c. 158, s. 914.)

§ 105-244. Additional remedies.—In addition to all other remedies for the collection of any taxes or fees due under the provisions of this subchapter, the Attorney General shall, upon the request of the Commissioner of Revenue, whenever any taxes, fees, or penalties due under this subchapter from any public utility (not an agency of interstate commerce) or corporation shall have remained unpaid for a period of ninety days, or whenever any corporation or public utility (not an agency of interstate commerce) has failed or neglected for ninety days to make or file any report or return required by this subchapter, or to pay any penalty for failure to make or file such report or return, apply to the superior court of Wake County, or of any county in the State in which such public utility (not an agency of interstate commerce) or corporation is located or has an office or place of business, for an injunction to restrain such public utility (not an agency of interstate commerce) or corporation from the transaction of any business within the State until the payment of such taxes or fees and penalties thereon, or the making and filing of such report or return and payment of penalties for failure to make or file such report or return, and the cost of such application, which shall be fixed by the court. Such petition shall be in the name of the State; and if it is made to appear to the court, upon hearing, that such public utility (not an agency of interstate commerce) or corporation has failed or neglected, for ninety days, to pay such taxes, fees, or penalties thereon, or to make and file

such reports, or to pay such penalties, for failure to make or file such reports or returns, such court shall grant and issue such injunction. (1939, c. 158, s. 915.)

- § 105-244.1. Cancellation of certain assessments.—The Commissioner of Revenue is hereby authorized, empowered and directed to cancel and abate all assessments made after October 16, 1940, for or on account of any tax owing to the State of North Carolina and which is payable to the Department of Revenue against any person who was killed while a member of the armed forces or who has a service connected disability as a result of which the United States is paying him disability compensation. This provision shall apply only to assessments made after October 16, 1940, for taxes which were due prior to the time the taxpayer was inducted into the armed forces. If any such assessment is or has been paid, the Commissioner of Revenue may refund the amount paid but shall not add thereto any interest. (1949, c. 392, s. 6.)
- § 105-245. Failure of sheriff to execute order.—If any sheriff of this State shall willfully fail, refuse, or neglect to execute any order directed to him by the Commissioner of Revenue and within the time provided in this subchapter, the official bond of such sheriff shall be liable for the tax, penalty, interest, and cost due by the taxpayer. (1939, c. 158, s. 916.)
- § 105-246. Actions, when tried.—All actions or processes brought in any of the superior courts of this State, under provisions of this subchapter, shall have precedence over any other civil causes pending in such courts, and the courts shall always be deemed open for trial of any such action or proceeding brought therein. (1939, c. 158, s. 917.)
- § 105-247. Municipalities not to levy income and inheritance tax.

 —No city, town, township, or county shall levy any tax on income or inheritance. (1939, c. 158, s. 918.)

§ 105-248. State taxes; purposes.—The taxes levied in this subchapter are for the expenses of the State government, the appropriations to its educational, charitable, and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the State, for public schools, and other specific appropriations made by law, and shall be collected and paid into the general fund of the State Treasurer.

The taxes levied under authority of section four hundred ninety-two of chapter four hundred twenty-seven of the Public Laws of one thousand nine hundred thirty-one, and remaining unpaid, shall be collected in the same manner as other county taxes and accounted for in the same manner as other taxes under the Daily Deposit Act. The county treasurer or other officer receiving such taxes in each county shall remit to the Treasurer of the State on the first and fifteenth days of each month all taxes collected up to the time of such remittance under the levy therein provided for, and such remittance to the State Treasurer shall also include the proportion of all poll taxes collected required by the Constitution of the State to be used for educational purposes.

The tax levy therein provided for shall be subject to the same discounts and penalties as provided by law for other county taxes, and there shall be allowed the same percentage for collecting such taxes as for other county taxes. The obligation to the State under the levy therein provided for shall run against all taxes that become delinquent; and with respect to any property that may be sold for taxes, any public officer receiving such delinquent taxes, when and if such property may be redeemed or such tax obligations in any manner satisfied, shall remit such proportionate part of such tax levy to the State Treasurer within fifteen days after receipt of same. At the end of each fiscal year the county accountant shall furnish the State Treasurer a statement of the total amount of

taxes levied in accordance with the provisions of this section, that are uncollected

at the end of the fiscal year.

Whenever in any law or act of incorporation, granted either under the general law or by special act, there is any limitation or exemption of taxation, the same is hereby repealed, and all the property and effects of all such corporations, other than the bonds of this State and of the United States government, shall be liable to taxation, except property belonging to the United States and to municipal corporations, and property of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries: Provided, that no property whatever, held or used for investment, speculation, or rent, shall be exempt, other than bonds of this State and of the United States government, unless said rent or the interest on or income from such investment shall be used exclusively for religious, charitable, educational, or benevolent purposes, or the interest upon the bonded indebtedness of said religious, charitable, or benevolent institutions. (1939, c. 158, s. 919.)

Editor's Note.—See 12 N. C. Law Rev.

23.

§ 105-249. Free privilege licenses for blind people.—Any blind person of the age of twenty-one years or more, desiring to operate a legitimate business of any kind to provide a livelihood for himself and dependents, if any, may apply to the welfare officer of the county in which he resides for free privi-

lege license

No one shall be eligible to the benefits provided for in this section who is not a blind person (the term "blind person" shall for the purposes of this section be construed to mean one who has suffered the total loss of his eyesight, or whose eyesight is so impaired as to unfit the person applying for the benefits under this section to engage in any labor, profession, or ordinary work in competition with his fellowmen with any degree of success, and/or any person suffering with impaired visions likely to produce total blindness), or who has an income of any kind amounting to twelve hundred (\$1200.00) dollars, or more net per annum, or whose husband or wife has an income of any kind amounting to twelve hundred

(\$1200.00) dollars or more net per annum.

It shall be the duty of the county commissioners upon receipt of application from anyone applying for the benefits under this section, to make a thorough investigation to determine whether or not the applicant is entitled to the privilege or other license as provided for in this section. When the commissioners are satisfied that the applicant is capable of operating the business for which said privilege or other license is asked and that he is a deserving person, the commissioners shall then present to the State license department a letter requesting necessary privilege or other license to operate the aforesaid business, and the State license department shall issue free of charge the license requested. The commissioners shall present to the county license department a letter requesting county privilege license necessary to operate the aforesaid business, and the county license department shall likewise issue free of charge the privilege license requested. The county commissioners shall also present, when necessary, to the municipal license department a letter requesting city privilege license necessary to operate aforesaid business, and the municipal license department shall issue free of charge privilege license requested: Provided, that the free privilege license of this section shall not apply to the sale of any kind of fireworks.

Any veteran of the United States armed forces to whom a privilege license was issued free under this section prior to one thousand nine hundred and forty-one shall be entitled to free privilege licenses hereunder so long as such veteran shall continue to be visually handicapped. (1933, c. 53; 1935, c. 162; 1939, c.

306; 1943, c. 122.)

Editor's Note. — The 1935 amendment paragraph.

added the proviso at the end of the third The 1939 amendment directed that the

words "or other" be inserted between the words "privilege" and "license" where they occur in four specified places of what is the third paragraph of this section. Such words do not occur together in one of the places specified, and hence the insertions were made in only three places. However, such

words appear in several other places of the section and it may have been the legislative intent to make insertions in such instances.

The 1943 amendment added the last paragraph.

§ 105-249.1. Members of armed forces and merchant marine exempt from license taxes and fees.—(a) License Taxes.—Any person serving in any branch of the armed forces of the United States or in the merchant marine during the period of such service shall be exempt from liability for any and all license taxes levied by the State or by any county or city in the State for the privilege of engaging in or carrying on any trade or profession in the State, which trade or profession such a person immediately prior to being called into such service was engaged in: Provided, that nothing herein contained shall relieve such person of any license tax for carrying on any trade or profession conducted through agents or employees or which is conducted in the name of and under the license of such person so entering into the service of the United States.

(b) License Fees.—Any person entering into the armed forces of the United States or in the merchant marine shall be during the period of such service exempt from paying any license fees to any licensing board or commission or to the State of North Carolina in which the payment of such license fees is by law required as a condition to the continuance of the privilege to engage in any trade or profession. Such a person upon being discharged from such service shall have all the rights and privileges to engage in such profession upon payment of such fees as may thereafter become due, to the same extent as though such activity had not been

suspended during the period of such service. (1943, c. 438, ss. 1, 2.)

§ 105-250. Law applicable to foreign corporations.—All foreign corporations, and the officers and agents thereof, doing business in this State, shall be subject to all the liabilities and restrictions that are or may be imposed upon corporations of like character, organized under the laws of this State, and shall have no other or greater powers. (1939, c. 158, s. 920.)

- § 105-250.1. Distributors of coin-operated machines required to make quarterly reports.—Every person, firm or corporation who or which owns and places on location other than on his or its own premises, under any lease or rental agreement, loan or otherwise, or which sells coin-operated machines or vending machines of any type whatsoever upon which a tax is levied under §§ 105-65 and 105-65.1 of the General Statutes (or upon which a tax shall hereafter be levied), hereinafter referred to as a distributor, shall file a quarterly informational report with the Commissioner of Revenue, in duplicate, as of the first day of March, June, September and December of each year, setting out the following information:
 - 1. The name and address of the distributor making the report.
 2. A description of the principal business of such distributor.

3. A list giving the location of each machine placed or remaining on location under any lease or rental agreement, loan or other arrangement whatsoever, other than by sale, together with the type of each such machine and its serial or other identifying number.

4. A list giving the location of each machine theretofore sold by the distributor, (whether such sale was for cash, on open account, or under a conditional sale or other title retention contract), together with the type of each such machine and its serial or other identifying number. Provided, that machines sold by the distributor but known by him to be no longer in service need not be reported.

5. A list giving the location of each machine, other than those described in Items 3 and 4 above, for the sale or use by, for or in which the distributor sells, leases,

services or in any manner furnishes any goods, wares, merchandise, records, equipment, accessories, supplies, parts or any services whatsoever, together with

the type of each such machine and its serial or other identifying number.

Provided, that the report required to be made as of June 1, 1949, (or the first report made by any distributor) shall contain a complete and true list of all of the machines described in Items 3, 4 and 5 above, together with the information required by said items, but the quarterly reports required to be made as of the first day of March, June, September and December thereafter need show only those machines placed on location or sold by the distributor or for which the distributor has begun furnishing supplies, equipment and other services since the date as of which the next preceding quarterly report was made.

As used herein, "location" shall include the name and address of the owner or operator of the place of business were the machine is located, or the address of the premises on which the machine is located and the name of the person principally

responsible for the operation of the machine.

Each quarterly report required by this section shall be made to the license tax division of the Department of Revenue not later than twenty days after the date as of which each report is required to be made.

The Commissioner of Revenue is hereby authorized and empowered to prescribe

forms to be used in making the reports required by this section.

Any distributor who shall fail to comply with the provisions of this section and who shall fail, without showing good cause therefor, to make timely, full and accurate reports shall be liable to a penalty equal to the amount of the tax on all the machines described in Items 3 and 4, whether or not the distributor would otherwise be liable for the tax on such machines: Provided, that this shall not be construed as relieving the owner and/or operator of such machines of liability for any tax which may be due thereon. (1949, c. 392, s. 6.)

- § 105-251. Information must be furnished.—Each company, firm, corporation, person, association, copartnership, or public utility shall furnish the Commissioner of Revenue in the form of returns prescribed by him, all information required by law and all other facts and information in addition to the facts and information in this act specifically required to be given, which the Commissioner of Revenue may require to enable him to carry into effect the provisions of the laws which the said Commissioner is required to administer, and shall make specific answers to all questions submitted by the Commissioner of Revenue. (1939, c. 158, s. 921.)
- § 105-252. Returns required.—Any company, firm, corporation, person, association, copartnership, or public utility receiving from the Commissioner of Revenue any blanks, requiring information, shall cause them to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall, in writing, give a good and sufficient reason for such failure.

The answers to such questions shall be verified under oath by such persons, or by the president, secretary, superintendent, general manager, principal accounting officer, partner, or agent, and returned to the Commissioner of Revenue at his office within the period fixed by the Commissioner of Revenue. (1939, c. 158, s. 922.)

§ 105-253. Personal liability of officers, trustees, or receivers.—Any officer, trustee, or receiver of any corporation required to file report with the Commissioner of Revenue, having in his custody funds of the corporation, who allows said funds to be paid out or distributed to the stockholders of said corporation without having satisfied the State Board of Assessment or Commissioner of Revenue for any State taxes which are due or have accrued, shall be personally responsible for the payment of said tax, and in addition thereto shall be subject to

a penalty of not more than the amount of the tax, nor less than twenty-five per

cent (25%) of such tax found to be due or accrued.

The Secretary of State shall withhold the issuance of any certificate of dissolution to, or withdrawal of, any corporation, domestic or foreign, until the receipt by him of a notice from the Commissioner of Revenue to the effect that any such corporation has met the requirements with respect to reports and taxes required by this subchapter. (1939, c. 158, s. 923; 1941, c. 50, s. 10.)

Editor's Note.—The 1941 amendment

added the second paragraph.

- § 105-254. Blanks furnished by Commissioner of Revenue.—The Commissioner of Revenue shall cause to be prepared suitable blanks for carrying out the purposes of the laws which he is required to administer, and, on application, furnish such blanks to each company, firm, corporation, person, association, copartnership, or public utility subject thereto. (1939, c. 158, s. 924.)
- § 105-255. Commissioner of Revenue to keep records.—The Commissioner of Revenue shall keep books of account and records of collections of taxes as may be prescribed by the Director of the Budget; shall keep an assessment roll for the taxes levied, assessed, and collected under this subchapter, showing in same the name of each taxpayer, the amount of tax assessed against each, when assessed, the increase or decrease in such assessment; the penalties imposed and collected, and the total tax paid; and shall make monthly reports to the Director of the Budget and to the Auditor and/or State Treasurer of all collections of taxes on such forms as prescribed by the Director of the Budget. (1939, c. 158, s. 925.)
- § 105-256. Publication of statistics.—The Commissioner of Revenue shall prepare and publish annually statistics reasonably available, with respect to the operation of this subchapter, including amounts collected, classifications of taxpayers, income and exemptions, and such other facts as are deemed pertinent and valuable. (1939, c. 158, s. 926.)
- § 105-257. Report on system of other states.—The Commissioner of Revenue shall biennially make report to the General Assembly, the said report to contain all available data that may be assembled by his department with respect to the tax laws and systems of this and other states, and making such recommendations as may be useful in improving the tax laws and system of this State. (1933, c. 88, s. 2.)

Editor's Note.—See 11 N. C. Law Rev. 250.

§ 105-258. Powers of Commissioner of Revenue; assistant commissioner may sign and verify pleadings, etc.—The Commissioner of Revenue, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of the tax due by any taxpayer under this subchapter, shall have the power to examine or cause to be examined, by any agent or representative designated by him for that purpose, any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the taxpayer or of any other person having knowledge in the premises, and may take testimony and require proof material for his information, and may administer oaths to such person or persons.

In any action, proceeding, or matter of any kind, to which the Commissioner of Revenue is a party or in which he may have an interest, all pleadings, legal notices, proofs of claim, warrants for collection, certificates of tax liability, executions, and other legal documents may be signed and verified by the assistant commissioner on behalf of the Commissioner. (1939, c. 158, s. 927; 1943, c. 400, s. 9.)

Editor's Note. — The 1943 amendment added the second paragraph.

§ 105-259. Secrecy required of officials—penalty for violation. — Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for the Commissioner of Revenue, any deputy, agent, clerk, other officer, employee, or former officer or employee, to divulge and make known in any manner the amount of income, income tax or other taxes, set forth or disclosed in any report or return required under this subchapter.

Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the Governor, Attorney General, or their duly authorized representative; or the inspection by a legal representative of the State of the report or return of any tax-payer who shall bring an action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or penalty imposed by this subchapter; nor shall the provisions of this section prohibit the Department of Revenue furnishing information to other governmental agencies, of persons and firms properly licensed under Schedule B, §§ 105-33 to 105-113. The Department of Revenue may exchange information with the officers of organized associations of taxpayers under Schedule B, §§ 105-33 to 105-113, with respect to parties liable for such taxes and as to parties who have paid such license taxes.

Reports and returns shall be preserved for three years, and thereafter until the

Commissioner of Revenue shall order the same to be destroyed.

Any person, officer, agent, clerk, employee, or former officer or employee violating the provisions of this section shall be guilty of a misdemeanor, and fined not less than two hundred dollars (\$200.00) nor more than one thousand dollars (\$1,000.00) and/or imprisoned, in the discretion of the court; and if such offending person be an officer or employee of the State, he shall be dismissed from such office or employment, and shall not hold any public office or employ-

ment in this State for a period of five years thereafter.

Notwithstanding the provisions of this section, the Commissioner of Revenue may permit the Commissioner of Internal Revenue of the United States, or the revenue officer of any other state imposing any of the taxes imposed in this subchapter, or the duly authorized representative of either, to inspect the report or return of any taxpayer; or may furnish such officer or his authorized agent an abstract of the report or return of any taxpayer; or supply such officer with information concerning any item contained in any report or return, or disclosed by the report of any investigation of such report or return of any taxpayer. Such permission, however, shall be granted or such information furnished to such officer, or his duly authorized representative, only if the statutes of the United States or of such other state grants substantially similar privilege to the Commissioner of Revenue of this State or his duly authorized representative. (1939, c. 158, s. 928.)

- § 105-260. Deputies and clerks.—The Commissioner of Revenue may appoint such deputies, clerks and assistants under his direction as may be necessary to administer the laws relating to the assessment and collection of all taxes provided for in this subchapter; may remove and discharge same at his discretion, and shall fix their compensation within the rules and regulations prescribed by law. (1939, c. 158, s. 929.)
- § 105-261. Commissioner and deputies to administer oaths.—The Commissioner of Revenue and such deputies as he may designate shall have the power to administer an oath to any person or to take the acknowledgment of any person in respect to any return or report required by this subchapter or under the rules and regulations of the Commissioner of Revenue, and shall have access to all the books and records of any person, firm, corporation, county, or municipality in this State. (1939, c. 158, s. 930.)

- 8 105-262. Rules and regulations.—The Commissioner of Revenue may, from time to time, make, prescribe, and publish such rules and regulations, not inconsistent with this subchapter, as may be needful to enforce its provisions. (1939, c. 158, s. 931.)
- § 105-263. Time for filing reports extended.—The Commissioner of Revenue, when he deems the same necessary or advisable, may extend to any person, firm, or corporation or public utility a further specified time within which to file any report required by law to be filed with the Commissioner of Revenue, in which event the attaching or taking effect of any penalty for failure to file such report or to pay any tax or fee shall be extended or postponed accordingly. Interest at the rate of six per cent (6%) per annum from the time the report or return was originally required to be filed to the time of payment shall be added to and paid with any tax that might be due on returns so extended. (1939, c. 158, s. 932.)
- 8 105-264. Construction of the subchapter; population.—It shall be the duty of the Commissioner of Revenue to construe all sections of this subchapter imposing either license, franchise, inheritance, income, or other taxes. Such decisions by the Commissioner of Revenue shall be prima facie correct, and a protection to the officers and taxpayers affected thereby. Where the license tax is graduated in this subchapter according to the population, the population shall be the number of inhabitants as determined by the last census of the United States government: Provided, that if any city or town in this State has extended its limits since the last census period, and thereafter has taken a census of its population in these increased limits by an official enumeration, either through the aid of the United States government or otherwise, the population thus ascertained shall be that upon which the license tax is to be graduated. (1939, c.

Authority of Commissioner to Construe. -This section gives the Commissioner of Revenue the power to construe the Revenue Act of 1939, codified as this subchapter, and such construction will be given due consideration by the courts, although it is

not controlling. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943). See Powell v. Maxwell, 210 N. C. 211, 186 S. E. 326

Stated in Clark v. Greenville, 221 N. C.

255, 20 S. E. (2d) 56 (1942).

- § 105-265. Authority for imposition of tax.—This subchapter shall constitute authority for the imposition of taxes upon the subject herein revised, and all laws in conflict with it are hereby repealed, but such repeal shall not affect taxes listed or which ought or should have been listed, or which may have been due, or penalties or fines incurred from failure to make the proper reports, or to pay the taxes at the proper time under any of the schedules of existing law, but such taxes and penalties may be collected, and criminal offenses prosecuted under such law existing on March 24, 1939, notwithstanding this repeal. (1939, c. 158, s. 935.)
- § 105-266. Overpayment of taxes to be refunded with interest .-If the Commissioner of Revenue discovers from the examination of any return, or otherwise, that any taxpayer has overpaid the correct amount of tax (including penalties, interests and costs, if any), such overpayment shall be refunded to the taxpayer within sixty days after it is ascertained together with interest thereon at the rate of six per cent (6%) per annum: Provided, that interest on any such refund shall be computed from a date ninety (90) days after date tax was originally paid by the taxpayer: Provided, further, that demand for such refund is made by the taxpayer within three years from the date of such overpayment or the due date of the return, whichever is later: Provided, further, that irrespective of any demand for refund, such overpayment may be credited upon any taxes against the same taxpayer which shall have become due prior to January

1st, 1947, if such taxpayer shall request such credit prior to paying the taxes against which the credit may be made. (1939, c. 158, s. 937; 1941, c. 50, s. 10; 1947, c. 501, s. 9; 1949, c. 392, s. 6.)

Editor's Note.—The 1941 amendment added the second proviso, and the 1947 amendment added the last proviso. The

1949 amendment added to the second proviso the words "or the due date of the return, whichever is later."

§ 105-267. Taxes to be paid; suits for recovery of taxes.—No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and notify such officer in writing that he pays same under protest. Such payment shall be without prejudice to any defense of rights he may have in the premises, and he may, at any time within thirty days after such payment. demand the same in writing from the Commissioner of Revenue of the State, if a State tax, or if a county, city, or town tax, from the treasurer thereof for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such official in the courts of the State for the amount so demanded. Such suit, if against the State Commissioner of Revenue, must be brought in the superior court of Wake County, or in the county in which the taxpayer resides, if the sum demanded is upwards of two hundred dollars (\$200.00), and if for two hundred dollars (\$200.00) or less, before any State court of competent jurisdiction in Wake County. If for a county, city or town tax, suit must be brought in a State court of competent jurisdiction in the county where the tax is collectible, and the defendant official has his official residence. If upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of State taxes for which judgment shall be rendered in such action shall be refunded by the State. (1939, c. 158, s. 936.)

Cross Reference.—As to refund of taxes illegally collected, see § 105-407 and note thereto.

Editor's Note.—See 12 N. C. Law Rev. 23.

Adequate Remedy at Law.—A suit to enjoin the collection of the photographer's tax imposed by § 105-41 was held not maintainable as there is an adequate remedy at law under the provision of this section. Lucas v. Charlotte, 14 F. Supp. 163 (1936).

Same—No Injunction Lies in Federal Courts.— A suit in equity to enjoin the collection of State tax, alleged to be violative of the Fourteenth Amendment on the ground of an arbitrary and excessive assessment, will not lie in the federal court, since the plaintiff has a plain, adequate, and complete remedy at law by first paying the tax and then suing to recover it. Catholic Society, etc. v. Madison County, 74 F. (2d) 848 (1935).

Same — Class Suit. — The remedy provided by this section cannot, in case of a class suit instituted in behalf of a large

number of taxpayers, be deemed an adequate remedy as compared with the suit in equity which eliminates so much useless and cumbersome litigation. Gramling v. Maxwell, 52 F. (2d) 256 (1931).

To Recover Tax Illegally Collected Statutory Procedure Must Be Complied with.-In order for a taxpayer to avoid the payment of a tax claimed by him to have been illegally assessed by the State, he must comply with procedure provided in the statute and where the statute specifies that he must pay the tax to the proper officer and notify him in writing that he pays under protest, and at any time within thirty days demand its refund from the State Commissioner in writing, and if not refunded in ninety days, bring action to recover the amount, the remedy given must be followed in order for the taxpayer to recover the amount, and the failure of the taxpayer to make the demand required until nearly two years after the payment of the tax is fatal; § 105-407, requiring the State Auditor to issue his warrant in certain instances, has no application. Bunn v.

Maxwell, 199 N. C. 557, 155 S. E. 250

Recovery of Entire Amount Paid under Protest, - Since a debtor may direct application of payment, and if neither debtor nor creditor makes application before institution of suit, the law will apply a payment to the unsecured or most precariously secured debt, when a taxpayer makes anticipatory payment not under protest, and thereafter pays under protest the balance of the taxes levied against his property, in his action under this section, to recover the taxes the entire amount paid under protest may be recovered when unlawful levies equal such amount, and the recovery will not be limited to the proportionate part which the unlawful levies bear to the entire tax levy, since it will not be presumed that the county intended to make an unlawful levy or that the taxpayer intended to pay tax illegally levied. Nantahala Power, etc., Co. v. Clay County, 213 N. C. 698, 197 S. E. 603 (1938).

Demand Where Tax Collector Is Also Treasurer.—Where the tax collector is also treasurer of the county, a written demand for the return of taxes paid to him under protest addressed to him in his capacity as tax collector without the appellation "treasurer" is a reasonable compliance with this section, and will support an action for the recovery of the taxes. Southern Ry. Co. v. Polk County, 227 N. C. 697, 44 S. E. (2d) 76 (1947).

Allegation That Tax Paid under Compulsion.—In an action under the Revenue Act of 1933 it was held that an allegation that the tax was paid under compulsion was a mere conclusion of the pleader, and a demurrer of the Commissioner of Revenue was sustained. Metro-Goldwyn-Mayer Distributing Corp. v. Maxwell, 209 N. C. 47, 182 S. E. 724 (1935).

Applied in Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332 (1942); Sabine v. Gill, 229 N. C. 599, 51 S. E. (2d) 1 (1948).

§ 105-268. Reciprocal comity.—The courts of this State shall recognize and enforce liabilities for taxes lawfully imposed by other states which extend a like comity to this State. (1939, c. 158, s. 938.)

Editor's Note.—See 13 N. C. Law Rev.

§ 105-269. Extraterritorial authority to enforce payment.—The Commissioner of Revenue, with the assistance of the Attorney General, is hereby empowered to bring suits in the courts of other states to collect taxes legally due this State. The officials of other states which extend a like comity to this State are empowered to sue for the collection of such taxes in the courts of this State. A certificate by the Secretary of State, under the Great Seal of the State, that such officers have authority to collect the tax shall be conclusive evidence of such authority. (1939, c. 158, s. 939.)

ARTICLE 10.

Liability for Failure to Levy Taxes.

§ 105-270. Repeal of laws imposing liability upon governing bodies of local units. — All laws and clauses of laws, statutes and parts of statutes, imposing civil or criminal liability upon the governing bodies of local units, or the members of such governing bodies, for failure to levy or to vote for the levy of any particular tax or rate of tax for any particular purpose, are hereby repealed, and said governing bodies and any and all members thereof are hereby freed and released from any civil or criminal liability heretofore imposed by any law or statute for failure to levy or to vote for the levy of any particular tax or tax rate for any particular purpose. (1933, c. 418.)

SUBCHAPTER II. ASSESSMENT, LISTING AND COLLECTION OF TAXES.

ARTICLE 11.

Short Title and Definitions.

§ 105-271. Official title.—This subchapter may be cited as the Machinery Act. (1939, c. 310, s. 1.)

Editor's Note. — The notes under this subchapter relate to similar provisions of former statutes.

The subject of taxation is regulated entirely by statutes, and the revenues of this

State are collected under the operation of what is known as the Machinery Act. Wade v. Commissioners, 74 N. C. 81 (1876).

§ 105-272. Definitions.—When used in this subchapter (unless otherwise specifically indicated by the context):

(1) The term "person" means an individual, trust, estate, partnership, firm

or company.

(2) The term "corporation" includes associations, joint-stock companies, insurance companies, and limited partnerships where shares of stock are issued.

(3) The term "domestic" when applied to corporations or partnerships means

created or organized under the laws of the State of North Carolina.

(4) The term "foreign" when applied to corporations or partnerships means a corporation or partnership not domestic.

(5) The term "Commissioner" means the Commissioner of Revenue.

(6) The term "deputy" means an authorized representative of the Commissioner of Revenue or other commissioner or of the State Board of Assessment.

(7) The term "taxpayer" means any person or corporation subject to a tax or duty imposed by the Revenue Act or Machinery Act, or whose property is subject to any ad valorem tax levied by the State or its political subdivisions.

(8) The term "State license" means a license issued by the Commissioner of

(8) The term "State license" means a license issued by the Commissioner of Revenue, usable, good and valid in the county or counties named in the license.

(9) The term "State-wide license" means a license issued by the Commissioner of Revenue, usable, good and valid in each and every county in this State.

(10) The term "intangible property" means patents, copyrights, secret processes and formulae, good will, trademarks, trade brands, franchises, stocks, bonds, cash, bank deposits, notes, evidences of debt, bills and accounts receivable, and other like property.

(11) The term "tangible property" means all property other than intangible.

(12) The term "public utility" as used in this subchapter means and includes each person, firm, company, corporation and association, their lessees, trustees or receivers, elected or appointed by any authority whatsoever, and herein referred to as express company, telephone company, telegraph company, Pullman car company, freight line company, equipment company, electric power company, gas company, railroad company, union depot company, water transportation company, street railway company, and other companies exercising the right of eminent domain, and such term, "public utility," shall include any plant or property owned or operated by any such persons, firms, corporations, companies or associations.

(13) The term "express company" means a public utility company engaged in the business of conveying to, from, or through this State, or part thereof, money, packages, gold, silver, plate, or other articles and commodities by express, not including the ordinary freight lines of transportation of merchandise and prop-

erty in this State.

(14) The term "telephone company" means a public utility company engaged in the business of transmitting to, from, through or in this State, or part thereof, telephone messages or conversations.

(15) The term "telegraph company" means a public utility company engaged

in the business of transmitting to, from, through, or in this State, or a part there-

of, telegraphic messages.

(16) The term "Pullman car company" means a public utility company engaged in the business of operating cars for the transportation, accommodation, comfort, convenience, or safety of passengers, on or over any railroad line or lines or other common carrier lines, in whole or in part within this State, such line or lines not being owned, leased, and/or operated by such railroad company, whether such cars be termed sleeping, Pullman, palace, parlor, observation, chair, dining or buffet cars, or by any other name.

(17) The term "freight line company" means a public utility company engaged in the business of operating cars for the transportation of freight or commodities, whether such freight and/or commodities is owned by such company or any other person or company, over any railroad or other common carrier line or lines in whole or in part within this State, such line or lines not being owned, leased and/or operated by such railroad company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture, refrigerator, fruit, meat, oil, or by any other name.

(18) The term "equipment company" means a public utility company engaged in the business of furnishing and/or leasing cars, of whatsoever kind or description, to be used in the operation of any railroad or other common carrier line or lines, in whole or in part within this State, such line or lines not being

owned, leased, or operated by such railroad company.

(19) The term "electric power company" means a public utility company engaging in the business of supplying electricity for light, heat and/or power pur-

poses to consumers within this State.

(20) The term "gas company" means a public utility company engaged in the business of supplying gas for light, heat, and/or power purposes to consumers within this State.

(21) The term "waterworks company" means a public utility company engaged in the business of supplying water through pipes or tubing and/or similar manner to consumers within this State.

(22) The term "union depot company" means a public utility company engaged in the business of operating a union depot or station for railroads or other

common carrier purposes.

(23) The term "water transportation company" means a public utility company engaged in the transportation of passengers and/or property by boat or other watercraft, over any waterways, whether natural or artificial, from one point within this State to another point within this State, or between points within this State and points without this State.

(24) The term "street railway company" means a public utility company engaged in the business of operating a street, suburban or interurban railway, either wholly or partially within this State, whether cars are propelled by steam, cable,

electricity, or other motive power.

(25) The term "railroad company" means a public utility company engaged in the business of operating a railroad, either wholly or partially within this State, or rights of way acquired or leased and held exclusively by such company or otherwise.

(26) The terms "gross receipts" or "gross earnings" mean and include the entire receipts for business done by any person, firm, or corporation, domestic or foreign, from the operation of business or incidental thereto, or in connection therewith. The gross receipts or gross earnings for business done by a corporation engaged in the operation of a public utility shall mean and include the entire receipts for business done by such corporation, whether from the operation of the public utility itself or from any other source whatsoever.

(27) The terms "bank," "banker," "broker," "stock jobber" mean and include

any person, firm, or corporation who or which has money employed in the busi-

ness of dealing in coin, notes, bills of exchange, or in any business of dealing, or in buying or selling any kind of bills of exchange, checks, drafts, bank notes, acceptances, promissory notes, bonds, warrants or other written obligations, or stocks of any kind or description whatsoever, or receiving money on deposit.

(28) The terms "collector" and "collectors" mean and include county, town-

ship, city or town tax collectors, and sheriffs.

(29) The terms "list takers" and "assessors" mean and include list takers,

assessors and assistants.

(30) The terms "real property," "real estate," "land," "tract," or "lot" mean and include not only the land itself, but also all buildings, structures, improvements and permanent fixtures thereon, and all rights and privileges belonging or in anywise appertaining thereto, except where the same may be otherwise denominated by this subchapter or the Revenue Act.

(31) The terms "shares of stock" or "shares of capital stock" mean and include the shares into which the capital or capital stock of an incorporated com-

pany or association may be divided.

(32) The terms "tax" or "taxes" mean and include any taxes, special assessments, costs, penalties, and/or interest imposed upon property or other subjects of taxation. (1939, c. 310, s. 2.)

ARTICLE 12.

State Board of Assessment.

§ 105-273. Creation; officers.—The Director of the Department of Tax Research, the Commissioner of Revenue, the chairman of the Public Utilities Commission, the Attorney General, and the Director of Local Government are hereby created the State Board of Assessment with all the powers and duties prescribed in the subchapter. The Commissioner of Revenue shall be the chairman of the said Board, and shall, in addition to presiding at the meetings of the Board, exercise the functions, duties, and powers of the Board when not in session. The Board may employ an executive secretary, whose entire time may be given to the work of the said Board, and is authorized to employ such clerical assistance as may be needed for the performance of its duties; all expenses of said Board shall be paid out of funds appropriated out of the general fund to the credit of the Department of Revenue of the State. (1939, c. 310, s. 200; 1941, c. 327, s. 6; 1947, c. 184.)

Cross Reference.—As to Department of Tax Research, see §§ 105-450 to 105-457.

Editor's Note. — The 1941 amendment rewrote this section.

The 1947 amendment substituted "Commissioner of Revenue" for "Director of the Department of Tax Research" in the second sentence.

Suits against Former State Tax Commission.—The former State Tax Commission (under the prior law corresponding to the State Board of Assessment) acted as a body and in a corporate capacity, and an

action or proceeding to compel that body to perform its ministerial duties must be brought against it in that capacity and not against its members, for its functions were not individual or personal, but corporate. Hence, mandamus to compel the refund of taxes alleged to have been paid under an excessive valuation of property would not lie against two of the commissioners as individuals. Jenkins Bros. Shoe Co. v. Travis, 168 N. C. 599, 84 S. E. 1036 (1915).

Cited in Catholic Society, etc. v. Madison County, 74 F. (2d) 848 (1935).

§ 105-274. Oath of office.—The members of the Board shall take and subscribe to the constitutional oath of office and file the same with the Secretary of State. (1939, c. 310, s. 201.)

Cross Reference.—As to form of oath, see § 11-7.

Cited in Catholic Society, etc. v. Madison County, 74 F. (2d) 848 (1935).

§ 105-275. Duties of the Board.—The State Board of Assessment shall exercise general and specific supervision of the systems of valuation and taxation

throughout the State, including counties and municipalities, and in addition it shall be and constitute a State Board of Equalization and Review of valuation

and taxation in this State. It shall be the duty of said Board:

(1) To confer with and advise boards of county commissioners, tax supervisors, assessing officers, list takers, and all others engaged in the valuation and assessment of property, in the preparation and keeping of suitable records, and in the levying and collection of taxes and revenues, as to their duties under this subchapter or any other act passed with respect to valuation of property, assessing, levying or collection of revenue for counties, municipalities and other subdivisions of the State, to insure that proper proceedings shall be brought to enforce the statutes pertaining to taxation and for the collection of penalties and liabilities imposed by law upon public officers, officers of corporations, and individuals failing, refusing or neglecting to comply with this subchapter; and to call upon the Attorney General or any prosecuting attorney in the State to assist in the execution of the powers herein conferred.

(2) To prepare a pamphlet or booklet for the instruction of the boards of county commissioners, tax supervisors, assessing officers, list takers, and all others engaged in the valuation of property, preparing and keeping records, and in the levying and collecting of taxes and revenue, and have the same ready for distribution at least thirty (30) days prior to the date fixed for listing taxes. The said pamphlet or booklet shall, in as plain terms as possible, explain the proper meaning of this subchapter and the revenue laws of this State; shall call particular attention to any points in the law or in the administration of the laws which may be or which have been overlooked or neglected; shall advise as to the practical working of the revenue laws and the Machinery Act, and shall explain and interpret any points that seem to be intricate and upon which county or State

officers may differ.

- (3) To hear and to adjudicate appeals from boards of county commissioners and county boards of equalization and review as to property liable for taxation that has not been assessed or of property that has been fraudulently or improperly assessed through error or otherwise, to investigate the same, and if error, inequality, or fraud is found to exist, to take such proceedings and to make such orders as to correct the same. In case it shall be made to appear to the State Board of Assessment that any tax list or assessment roll in any county in this State is grossly irregular, or any property is unlawfully or unequally assessed as between individuals, between sections of a county, or between counties, the said Board shall correct such irregularities, inequalities and lack of uniformity, and shall equalize and make uniform the valuation thereof upon complaint by the board of county commissioners under rules and regulations prescribed by it, not inconsistent with this subchapter: Provided, that no appeals shall be considered or fixed values changed unless notice of same is filed within sixty (60) days after the final values are fixed and determined by the board of county commissioners or the board of equalization and review, as hereinafter provided: Provided, further, that each taxpayer or ownership interest shall file separate and distinct appeals; no joint appeals shall be considered except by and with consent of the State Board of Assessment.
- (4) To require from the register of deeds, auditor, county accountant, tax clerk, clerk of the court or other officer of each county, and the mayor, clerk or other officer of each municipality, on forms prepared and prescribed by the said Board, such annual and other reports as shall enable said Board to ascertain the assessed valuation of all property listed for taxation in this State under this or any other act, the rate and amount of taxes assessed and collected, the amount returned delinquent, tax sales, certificates of purchase at such tax sales held by the State, county or municipality, and such other information as the Board may require, to the end that it may have full, complete, and accurate statistical information as to the practical operation of the tax and revenue laws of the State.

(5) To require the Secretary of State, and it shall be his duty, to furnish monthly to the said Board a list of all domestic corporations incorporated, charter amended or dissolved, all foreign corporations domesticated, charter amended, dissolved or domestication withdrawn during the preceding month, in such detail as may be prescribed by said Board.

(6) To make diligent investigation and inquiry concerning the revenue laws and systems of taxation of other states, so far as the same are made known by published reports and statistics and can be ascertained by correspondence with

officers thereof.

- (7) To report to the General Assembly at each regular session, or at such other times as it may direct, the total amount of revenue or taxes collected in this State for State, county, and municipal purposes, classified as to State, county, township, and municipality, with the sources thereof; to report to the General Assembly the proceedings of the Board and such other information and recommendations concerning the public revenues as required by the General Assembly or that may be of public interest; to cause two thousand copies of said report to be printed on or before the first day of January in the year of the regular session of the General Assembly, and place at the disposal of the State Librarian one hundred (100) copies of said report for distribution and exchange, if and when funds are available for said purpose; and to forward a copy of said report to each member of the General Assembly as soon as printed.
- (8) To discharge such other duties as may be prescribed by law, and take such action, do such things, and prescribe such rules and regulations as may be needful and proper to enforce the provisions of this subchapter and the Revenue

(9) To prepare for the legislative committee of succeeding general assemblies such suggestions of revision of the revenue laws, including the Machinery Act, as it may find by experience, investigation, and study to be expedient and wise.

(10) To report to the Governor, on or before the first day of January of each year, the proceedings of said Board during the preceding year, with such recommendations as it desires to submit with respect to any matters touching taxation and revenue.

(11) To keep full, correct and accurate records of its official proceedings.(12) To properly administer the duties prescribed by Schedule H, §§ 105-198 to 105-217, with respect to division and certification of taxes collected thereunder: the State Board of Assessment shall hear and pass upon any matters relative thereto.

(13) To perform the duties imposed upon it with respect to the classification and assessment of property. (1939, c. 310, s. 202.)

Review of Assessment.—Under the prior law original proceedings before the State Board of Assessment to have the value of property reduced for taxation would be disregarded and considered as a nullity when the question involved was solely whether such value theretofore fixed and agreed upon be reduced. Caldwell County v. Doughton, 195 N. C. 62, 141 S. E. 289 (1928).

Statutory Method of Assessment and Appeal Must Be Followed. - A particular board, such as the State Board of Assessment, given authority to assess or fix the value of property for taxation, is exercising a quasi judicial function, and when a method is provided by the State for appeals from the exercise of this function, and the taxpayer fails to avail himself of it, he cannot bring an action to recover back that portion of the taxes so assessed which he claims to be illegal. The method provided by statute for assessment and appeal from the assessment must be followed. The facts of the instant case did not permit a variation of this rule. Manufacturing Co. v. Commissioners of Pender, 196 N. C. 744, 147 S. E. 284 (1929).

Applied in Catholic Society, etc. v. Madison County, 74 F. (2d) 848 (1935).

& 105-276. Powers of the Board.—To the end that the Board may properly discharge the duties placed upon it by law, it is hereby accorded the following powers:

(1) It may, in its discretion, prescribe the forms, books, and records that shall be used in the valuation of property and in the levying and collection of taxes, and how the same shall be kept; to require the county tax supervisors, clerks or boards of county commissioners, or auditor of each county to file with it, when called for, complete abstracts of all real and personal property in the county, itemized by townships and as equalized by the county board of equalization and review; and to make such other rules and regulations, not included in this subchapter or the Revenue Act, as said Board may deem needful effectually to promote the purposes for which the Board is constituted and the systems of taxation provided for in this and the Revenue Act.

(2) The Board, its members or any duly authorized deputy shall have access to all books, papers, documents, statements, records and accounts on file or of records in any department of State, county or municipality, and is authorized and empowered to subpoena witnesses upon a subpoena signed by the chairman of the Board, directed to such witnesses, and to be served by any officer authorized to serve subpoenas; to compel the attendance of witnesses by attachment to be issued by any superior court upon proper showing that such witness or witnesses have been duly subpoenaed and have refused to obey such subpoena or subpoenas; and to examine witnesses under oath to be administered by any member or authorized

agent of the Board.

(3) The Board, its members or any duly authorized deputy are authorized and empowered to examine all books, papers, records or accounts of persons, firms and corporations, domestic and foreign, owning property liable to assessment for taxes, general or specific, levied by this State or its subdivisions. Said Board, its members or any duly authorized deputy are also given power and authority to examine the books, papers, records or accounts of any person, firm or corporation where there is ground for believing that information contained in such books, papers, records and accounts is pertinent to the decision of any matter pending before said Board, regardless of whether such person, firm or corporation is a party to the proceeding before the Board. Books, papers, records or accounts examined under authority of this subdivision of this section shall be examined only after service of a proper subpoena, signed by the chairman of the Board and served by an officer authorized to serve subpoenas upon the person having the custody of such books, papers, records or accounts.

Any person, persons, member of a firm, or any officer, director or stockholder of a corporation, bank or trust company who shall refuse permission to inspect any books, papers, documents, statements, accounts or records demanded by the State Board of Assessment, the members thereof, or any duly authorized deputy provided for in this subchapter or the Revenue Act, or who shall willfully fail, refuse, or neglect to appear before said Board in response to its subpoena or to testify as provided for in this subchapter and the Revenue Act, shall, in addition to all other penalties imposed in this subchapter or the Revenue Act, be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

(4) The Board is authorized and empowered to direct any member or members of the Board to hear complaints, to make examinations and investigations, and to report his or their findings of fact and conclusions of law to the Board. Upon demand of any party to an appeal pending before the Board, the Board shall send one of its members or a special representative designated by it to make an actual examination of the property and other similar property in the same county and report to the Board. The cost of making said examination shall be advanced by the county: Provided, that in cases in which the examination is demanded by a tax-payer, if the Board's decision does not substantially affirm the contentions of the taxpayer, the Board in its decision shall direct that the county advancing the cost may add such cost to the taxes levied against the property.

(5) The Board shall have power to certify copies of its records and proceedings, attested with its official seal, and copies of records or proceedings so certified shall

be received in evidence in all courts in this State with like effect as certified copies

of other public records.

(6) The Board shall make available personally to the tax supervisors or county board of commissioners any information contained in any report to said State Board, or in any report to the Department of Revenue or other State department to which said State Board may have access, or any other information which said State Board may have in its possession which may assist said supervisors or commissioners in securing an adequate listing of property for taxation or in assessing taxable property.

Except as herein specified, and except to the Governor or his authorized agent or solicitor or authorized agent of the solicitor of a district in which such information would affect the listing or valuation of property for taxes, the State Board shall not divulge or make public the reports made to it or to other departments. Provided, this shall not interfere with the publication of assessments and decisions made by said Board or with publication of statistics by said Board; nor shall it prevent presentation of such information in any administrative or judicial proceedings involving assessments or decisions of soid Board.

ceedings involving assessments or decisions of said Board.

Information transmitted or made available to local tax authorities under this section shall not be divulged or published by such authorities, and shall be used only for the purposes of securing adequate tax lists, assessing taxable property and presentation in administrative or judicial proceedings involving such lists or assessments.

(7) The Board is authorized to exercise all powers reasonably necessary to perform the duties imposed upon it by this subchapter or other acts of this State. (1939, c. 310, s. 203; 1945, c. 955.)

Editor's Note.—The 1945 amendment rewrote the first paragraph of subsection (6).

§ 105-277. Sessions of Board, where to be held.—The regular sessions of the State Board of Assessment shall be held in the city of Raleigh at the office of the chairman, and other sessions may be called at any place in the State to be decided by the Board. (1939, c. 310, s. 204.)

ARTICLE 13.

Quadrennial and Annual Assessment.

105-278. Listing and assessing in quadrennial years.—In one thousand nine hundred forty-one, and quadrennially thereafter, all property, real and personal, subject to taxation, shall be listed and assessed for ad valorem tax purposes: Provided, that in one thousand nine hundred forty-one, and quadrennially thereafter, the county boards of commissioners may determine whether real property in the respective counties and townships shall be revalued by horizontal increase or reduction or by actual appraisal thereof, or both. Where the horizontal method is used, the provisions of § 105-279 shall also apply: Provided, that the boards of county commissioners of the various counties of the State may, in their discretion, defer or postpone the revaluation and reassessment of real property required herein in the year one thousand nine hundred and forty-one, and all proceedings and actions heretofore taken by said board of county commissioners in any county in the State as to postponement, or as to increases or reductions or by actual appraisal thereof, are hereby in all respects ratified, validated, and confirmed; any such board of county commissioners may, in its discretion, defer or postpone any such revaluation, reassessment, or reappraisal for the years one thousand nine hundred and forty-two and one thousand nine hundred and forty-three. But this second proviso shall not apply to any county for which a revaluation board of assessors or a board of equalization and review has been

created or provided for by any act of the General Assembly of one thousand nine hundred and forty-one. Provided, further, that if the board of commissioners of any county shall neglect to provide for a general revaluation of all real property in the county in any revaluation year, such neglect shall not have the effect of invalidating existing valuations and tax levies. Provided, further, that the boards of commissioners of the various counties of the State may, in their discretion, defer or postpone revaluation and reassessment of real property for the years one thousand nine hundred and forty-five and one thousand nine hundred and forty-six: Provided, further, that the boards of commissioners of the various counties of the State may, in their discretion, defer or postpone revaluation and reassessment of real property for the years 1947 and 1948: Provided, further, that the boards of commissioners of the various counties of the State may, in their discretion, defer or postpone revaluation and reassessment of real property for the years 1949 and 1950. Whenever revaluation is had, the same may be by horizontal increase or reduction or by actual appraisal thereof, or both. (1939, c. 310, s. 300; 1941, c. 282, ss. 1, 1½; 1943, c. 634, s. 1; 1945, c. 5; 1947, c. 50; 1949. c. 109.)

Local Modification. - Ashe, Rowan: 1941, c. 282, s. 2; New Hanover: 1949, c.

535 (temporary).

Editor's Note.—The 1941 amendment inserted the second proviso. The amendment further provided that it shall not repeal or affect any public-local or private act of the General Assembly of 1941.

The 1943 amendment added the third

The 1945 amendment added the fourth

The 1947 amendment added the fifth proviso and the last sentence.

The 1949 amendment added the sixth proviso and re-enacted the last sentence.

For comment on the 1941 amendment. see 19 N. C. Law Rev. 525; on the 1947 amendment, see 25 N. C. Law Rev. 463.

Deferring Revaluation .- Under the 1941 amendment to this section the commissioners of a county were authorized to defer the revaluation due to be made in the year 1941 to the year 1942, or to any year prior to the revaluation due to be made in the year 1945. Moore v. Sampson County, 220 N. C. 232, 17 S. E. (2d) 22 (1941).

§ 105-279. Listing and assessing in years other than quadrennial years .- In the year one thousand nine hundred thirty-nine and in other than quadrennial years all property, real and personal, subject to taxation, shall be listed for ad valorem tax purposes. Property not subject to reassessment in such years shall be listed at the value at which it was assessed at the last quadrennial assessment. In all such years the following property shall be assessed or reassessed:

(1) All personal property (which for purposes of taxation shall include all personal property whatsoever, tangible or intangible, except personal property

expressly exempted by law).

(2) All machinery, service station equipment, merchandise and trade fixtures, barber shop equipment, meat market equipment, restaurant and cafe fixtures, drugstore equipment and similar property not permanently affixed to the real es-

(3) All real property (which for purposes of taxation shall include all lands within the State and all buildings and fixtures thereon and appurtenances thereto)

Was not assessed at the last quadrennial assessment.

(b) Has increased in value to the extent of more than one hundred dollars (\$100.00) by virtue of improvements or appurtenances added since the last assessment of such property.

(c) Has decreased in value to the extent of more than one hundred dollars (\$100.00) by virtue of improvements or appurtenances damaged, destroyed or re-

moved since the last assessment of such property.

(d) Has increased or decreased in value since the last assessment of such property by virtue of some extraordinary circumstances, such circumstances being those of unusual occurrence in trade or business, and the facts in connection with which shall be found by the board of equalization in each case and entered upon the proceedings of said board.

(e) Has been subdivided into lots located on streets already laid out and open, and sold or offered for sale as lots, since the date of the last assessment of such property. This shall apply to all cases of subdivision into lots, regardless of whether the land is situated within or without an incorporated municipality: Provided, that where lands have been subdivided into lots, and more than five acres of any such subdivision remain unsold by the owner thereof, the unsold portion may be listed as land acreage, in the discretion of the tax supervisor.

(f) Was last assessed at an improper figure as the result of a clerical error.

(g) Was last assessed at a figure which manifestly is unjust by comparison with the assessment placed upon similar property in the county: Provided, that the power to reassess under this subdivision shall be exercised only by the board of equalization and review, subject to appeal to the State Board of Assessment. (1939, c. 310, s. 301.)

§ 105-280. Date as of which assessment is to be made.—All property, real and personal, shall be listed or listed and assessed, as the case may be, in accordance with ownership and value as of the first day of April, one thousand nine hundred thirty-nine, and thereafter all property shall be listed or listed and assessed in accordance with ownership and value as of the first day of January each year.

Whenever any real property is acquired after January first, and prior to July first, which property was not required to be listed for taxation on the first day of January on account of the nontaxable character of the ownership of the same, such property shall be listed for taxation by the purchaser as of the time of purchase and shall be taxed for the fiscal year of the taxing unit beginning on July first of the year in which such real property is acquired.

Such property shall be assessed for taxation by the county tax supervisor after ten days' notice sent by registered mail to the person in whose name such property is listed. The person in whose name such property is listed for taxation shall have the right to appeal to the board of county commissioners as to the valuation of said property in the event he is dissatisfied with the valuation placed thereon by the county tax supervisor within ten days after notice by mail of same, and the county board of commissioners shall have the authority given to it as a county board of equalization and, in determining and fixing the valuation of said property, the right of appeal therefrom by the taxpayer of the county shall be the same as provided for listings made on the regular date.

In the event such property is acquired from any governmental unit which by contract is paying to the taxing unit payments in lieu of taxes for the fiscal period ending on the thirtieth day of June of the year in which such property is acquired, the tax on such property so acquired shall be one-half of the amount of the tax on such property as it would have been if regularly listed for taxation as of ownership on the first day of January. (1939, c. 310, s. 302; 1945, c. 973.)

Editor's Note. — The 1945 amendment added the last three paragraphs.

When Lien Attaches.—Under the former law the lien for taxes attached to realty on the first day of April of each year, the date

on which land was required to be listed in the name of the owner. Bemis Hardwood Lbr. Co. v. Graham County, 214 N. C. 167, 198 S. E. 843 (1938).

§ 105-281. Property subject to taxation.—All property, real and personal, within the jurisdiction of the State, not especially exempted, shall be subject to taxation. (1939, c. 310, s. 303.)

Editor's Note.—For cases construing a be included as personal property, see former statute, which defined what should Mecklenburg County v. Sterchi Bros.

Stores, 210 N. C. 79, 185 S. E. 454 (1936); Lawrence v. Shaw, 210 N. C. 352, 186 S.

E. 504 (1936).

Taxation of Personal Property of Nonresidents Is Constitutional.—The taxation of personal property of nonresidents by this State when such personal property has acquired a taxable situs here does not violate the provisions of the 14th Amendment of the federal Constitution, the rule that personal property follows the domicile of the owner being subject to an exception when such personalty is held in such a manner as to create a "business situs" for the purpose of taxation. Mecklenburg County v. Sterchi Bros. Stores, 210 N. C. 79, 185 S. E. 454 (1936), construing former statute.

§ 105-282. Article subordinate to §§ 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 304.)

ARTICLE 14.

Personnel for County Tax Listing and Assessing.

§ 105-283. Appointment and qualifications of tax supervisors.—At or before the regular meeting next preceding the date as of which property is to be listed and assessed, the board of county commissioners of each county shall appoint as tax supervisor some person who shall be a freeholder in the county, who shall for one year immediately preceding the appointment, have been a resident of the county, and whose experience in the valuation of real and personal property is satisfactory to the board.

In counties in which there is an auditor, tax clerk, county accountant, all-time chairman of the board of county commissioners, or other similar officer, either may be designated as supervisor by the board of county commissioners. (1939,

c. 310, s. 400.)

§ 105-284. Term of office and compensation of supervisors.—The tax supervisor shall serve for one year or for such shorter period of time as the board may designate. In the case he is appointed for one year, he shall serve until his successor is appointed and has qualified, subject to removal for cause by the board of commissioners at any time. Any vacancy shall be filled by appointment by the board of commissioners.

The compensation of the supervisor shall be fixed by the board of commissioners, and he shall be allowed such expenses as the commissioners may approve.

(1939, c. 310, s. 401.)

§ 105-285. Oath of office of supervisor.—Immediately after his appointment, and before entering upon the duties of his office, the supervisor shall file with the clerk of the board of commissioners the following oath, subscribed and sworn to before the chairman of the board of commissioners or some other officer qualified to administer oaths:

office; so help me, God.

(Signature)

(1939, c. 310, s. 402.)

§ 105-286. Powers and duties of tax supervisor.—(1) The supervisor shall have general charge of the listing and assessing of all property in the county in accordance with the provisions of law.

(2) He shall appoint the list takers and assessors, subject to the approval of

the commissioners, as hereinafter provided.

(3) He shall, on the second Monday preceding the date as of which property is to be assessed or at some time during the week which includes said Monday, convene the list takers and assessors for general consideration of methods of securing a complete list of all property in the county, and of assessing, in accordance with law, all property which is to be assessed during the approaching listing period.

(4) He shall visit each list taker at least once during the period of listing, and shall confer with each list taker during said period as often as he or the list taker deems necessary, to the end that all property shall be listed and assessed according to law, and that assessments shall be equalized as between the various town-

ships.

(5) He shall have power to subpoena any person for examination under oath and to subpoena any books, papers, records or accounts whenever he has reasonable grounds for the belief that such person has knowledge of such books, papers, records and accounts containing information which is pertinent to the discovery or the valuation of any property subject to taxation in the county, or which is necessary for compliance with the requirements as to what the tax list shall contain, hereinafter set forth. The subpoena shall be signed by the chairman of the county board of equalization and served by an officer qualified to serve subpoenas.

(6) He may require that any or all persons, firms and corporations, domestic and foreign, engaged in operating any business enterprise in the county shall submit, in connection with his or its regular tax list, a detailed inventory, statement of assets and liabilities, or other similar information pertinent to the discovery of valuation of property taxable in the county. Inventories, statements of assets and liabilities or other information not expressly required by this subchapter to be shown on the tax list itself, secured by the supervisor under the terms of this subdivi-

sion, shall not be open to public inspection.

Any supervisor or other official disclosing information so obtained, except as such disclosure may be necessary in listing or assessing property or in administrative or judicial proceedings relating to such listing or assessing, shall be guilty of a misdemeanor and punishable by fine not exceeding fifty dollars (\$50.00).

(7) He shall have power, for good cause, and prior to the first meeting of the board of equalization and review, to change the valuation placed upon any property by the list taker, provided such property is subject to assessment for the current year, and provided that notice of such change is given to the taxpayer prior to the meeting of said board.

(8) He shall perform such other duties as may be imposed upon him by law, and shall have and exercise all powers reasonably necessary in the performance of his duties, not inconsistent with the Constitution or the laws of this State.

(1939, c. 310, s. 403.)

§ 105-287. Appointment, qualifications, and number of list takers and assessors.—Subject to the approval of the county commissioners, the supervisor, on or before the second Monday preceding the date as of which property is to be assessed, shall appoint some competent person to act as list taker and assessor in each township. With the approval of the commissioners he may appoint more than one such person for any township in which is situated an incorporated town or part of an incorporated town. In quadrennial years three such persons shall be appointed in each township, and more than three may be appointed in townships in which is located an incorporated town or part of an incorporated town; and in such years, at the time of their appointment, such appointees shall have been resident freeholders of the county for at least twelve months: Provided, that in any county adopting the horizontal method of revaluations in one thousand nine hundred forty-one, and quadrennially thereafter, the commissioners may appoint less than three list takers and assessors per town-

ship: Provided, further, that in quadrennial years the board of county commissioners may appoint one list taker and assessor in each township if in addition thereto at least two county-wide list takers and assessors are appointed; or said board may appoint not more than three qualified assessors to assess all real estate in the county. In every year the persons appointed shall be persons of character and integrity, and shall have such experience in the valuation of types of property commonly owned in the county as shall satisfy the supervisor and the commissioners. (1939, c. 310, s. 404.)

§ 105-288. Term of office and compensation of list takers and assessors.— The list takers and assessors shall serve for such period as may be fixed by the commissioners. They shall receive for their services such compensation as the commissioners may fix. No list taker shall receive compensation until the supervisor has checked over the lists accepted by him, as hereinafter required, and certified that his work has been satisfactory. Each list taker shall make out his account in detail, specifying each day's services, which account shall be audited by the county accountant and approved by the commissioners. (1939, c. 310, s. 405.)

§ 105-289. Oath of list takers and assessors.—Before entering upon his duties each list taker and assessor shall take the following oath, which shall be filed with the clerk to the board of commissioners after having been subscribed and sworn to before some officer qualified to administer oaths:

(Signature)

(1939, c. 310, s. 406.)

§ 105-290. Powers and duties of list takers and assessors.—(1) At least ten days before the date as of which property is to be assessed, each list taker shall post, in five or more public places in his township, a notice containing at least the following: (a) The date as of which property is to be assessed; (b) the date on which listing will begin; (c) the date on which the listing will end; (d) the times and places between the last two dates mentioned at which lists will be accepted; (e) a notice that all persons who, on the date as of which property is to be assessed, own property subject to taxation must list such property within the period set forth in the notice, and that failure to do so will subject such persons to the penalties prescribed by law.

In townships in which more than one list taker has been appointed the posting of these notices shall be the duty of one of them, to be designated by the super-

visor

In case the period of listing in any township shall be extended by the commissioners, as hereinafter permitted, it shall be the duty of the list taker who first posted the notices to post new notices in the same places, giving notice of the extension and notice of the times and places at which lists will be accepted during the extended period.

(2) Each list taker shall attend the meeting referred to in subdivision three of

§ 105-286

(3) The list takers and assessors, under the supervision of the supervisor, shall secure lists of all real and personal property and polls subject to taxation in their townships, and shall assess all such property as is subject to assessment under the provisions of this subchapter. To this end they shall secure from each tax-payer or person whose duty it is to list property or poll in their respective townships a list containing the information hereinafter specified, and shall have the authority to visit any such person or his property, to investigate the value of any

such property, and to examine under oath any such person present before them for the purpose of listing property. The supervisor may, in his discretion, require any list taker and assessor to visit each person in his township whose prop-

erty or poll is subject to taxation.

(4) Each list taker and assessor shall have power to subpoena any person for examination under oath whenever he has reasonable grounds for belief that such person has knowledge which is pertinent to the discovery or valuation of property subject to taxation in his township or which is necessary for compliance with the requirements, hereinafter set forth, as to what the tax list shall contain.

(5) The list takers and assessors shall perform such duties in connection with the making up of the tax records and in connection with the discovery of unlisted

property as hereinafter specified.

- (6) The list takers and assessors shall perform such other duties as may be by law imposed upon them; and they shall have and exercise all powers necessary to the proper discharge of their duties not inconsistent with the Constitution or the statutes of this State. (1939, c. 310, s. 407.)
- 105-291. Employment of experts.—The board of county commissioners in each county, at the request of the county supervisor of taxation, may in their discretion employ one or more persons having expert knowledge of the value of specific kinds or classes of property within the county, such as mines, factories, mills and other similar property, to aid and assist the county supervisor of taxation and the list takers and assessors in the respective townships, or to advise with, aid and assist the board of equalization and review in arriving at the true value in money of the property in the county. Such expert, or experts, so employed by the board of county commissioners shall receive for their services such compensation as the board of county commissioners shall designate. (1939, c. 310, s. 408.)
- § 105-292. Clerical assistants.—The county commissioners may, in their discretion, upon recommendation of the supervisor, employ such clerical assistants to the supervisor as they deem proper, and at such compensation and for such terms as they deem proper. Such assistants shall perform such duties as the commissioners or the supervisor may assign to them. (1939, c. 310, s. 409.)
- § 105-293. Tax commission.—In all counties having a tax commission, said commission shall do and perform all the duties required by this subchapter to be performed by county commissioners except levying taxes, and all expenses incurred by said tax commission or its appointees in accordance with this subchapter shall be paid by the county commissioners out of the general county funds. (1939, c. 310, s. 410.)

ARTICLE 15.

Classification, Valuation and Taxation of Property.

§ 105-294. Taxes to be on uniform ad valorem basis as to class .-All property, real and personal, shall as far as practicable, be valued at its true value in money, and taxes levied by all counties, municipalities and other local taxing authorities shall be levied uniformly on valuations so determined. intent and purpose of this subchapter is to have all property and subjects of taxation assessed at their true and actual value in money, in such manner as such property and subjects are usually sold, but not by forced sale thereof, and the words "market value," "true value," or "cash value," whenever used in the tax laws of this State, shall be held to mean for what the property and subjects can be transmuted into cash when sold in such manner as such property and subjects are usually sold: Provided, nothing in this section shall be construed as conflicting with or modifying the provisions of Schedule H, §§ 105-198 to 105-217, or

the provisions of this subchapter classifying other property.

It is hereby declared to be the policy of this State so to use its system of real estate taxation as to encourage the conservation of natural resources and the beautification of homes and roadsides, and all tax assessors are hereby instructed to make no increase in the tax valuation of real estate as a result of the owner's enterprise in adopting any one or more of the following progressive policies:

1. Planting and care of lawns, shade trees, shrubs and flowers for noncom-

mercial purposes.

2. Repainting buildings.

3. Terracing or other methods of soil conservation, to the extent that they preserve values already existing.

4. Protection of forests against fire.

- 5. Planting of forest trees on vacant land for reforestation purposes (for ten years after such planting). (1939, c. 310, s. 500.)
- § 105-294.1. Agricultural products in storage. If the board of county commissioners of any county shall determine as a fact that any agricultural product is held in said county by any manufacturer or processor for manufacturing or processing, which agricultural product is of such nature as customarily to require storage and processing for periods of more than one year in order to age or condition such product for manufacture, and if such determination is entered on the minutes of such board on or before March 31st in any year, such agricultural product shall be taxed in that year uniformly as a class at sixty per cent (60%) of the rate levied for all purposes upon real estate and other tangible personal property by or for said county and/or the city, town, or special district in which such agricultural products are listed for taxation. (1947, c. 1026.)

Editor's Note.—For discussion of section, see 25 N. C. Law Rev. 463.

§ 105-295. Land and buildings.—In determining the value of land the assessors shall consider as to each tract, parcel or lot separately listed at least its advantages as to location, quality of soil, quantity and quality of timber, water power, water privileges, mineral or quarry or other valuable deposits, fertility, adaptability for agricultural, commercial or industrial uses, the past income therefrom, its probable future income, the present assessed valuation, and any other factors which may affect its value.

In determining the value of a building the assessors shall consider at least its location, type of construction, age, replacement, cost, adaptability for residence, commercial or industrial uses, the past income therefrom, the probable future income, the present assessed value, and any other factors which may affect its value. Buildings partially completed shall be assessed in accordance with the degree of completion on the day as of which property is assessed. (1939, c. 310, s. 501.)

ARTICLE 16.

Exemptions and Deductions.

§ 105-296. Real property exempt.—The following real property, and no

other, shall be exempted from taxation:

(1) Real property owned by the United States or this State, and real property owned by the State for the benefit of any general or special fund of the State, and real property lawfully owned and held by counties, cities, townships, or school districts, used wholly and exclusively for public or school purposes. The repeal of the exemption of real property indirectly owned by federal, State or local governments shall be effective for the tax year one thousand nine hundred and forty-three, and such property indirectly owned shall be placed upon the tax books for

one thousand nine hundred and forty-three and subject to the tax rates levied on real estate in the year one thousand nine hundred and forty-three.

(2) Real property, tombs, vaults and mausoleums set apart for burial pur-

poses, except such as are owned and held for purposes of sale or rental.

(3) Buildings, with the land upon which they are situated, lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building.

(4) Buildings, with the land actually occupied, wholly devoted to educational purposes, belonging to, actually and exclusively occupied and used for public libraries, colleges, academies, industrial schools, seminaries, or any other institutions of learning, together with such additional adjacent land owned by such libraries and educational institutions as may be reasonably necessary for the convenient use of such buildings, and also buildings thereon used as residences by the officers or instructors of such educational institutions.

(5) Real property belonging to, actually and exclusively occupied by Young Men's Christian Associations and other similar religious associations, orphanages, or other similar homes, hospitals and nunneries not conducted for profit, but en-

tirely and completely as charitable.

(6) Buildings, with the land actually occupied, belonging to the American Legion or Post of the American Legion, or any other veterans' organization chartered by Congress or organized and operating on a State-wide or nation-wide basis, or any post or other local organization thereof, or any benevolent, patriotic, historical, or charitable association used exclusively for lodge purposes by said societies or associations, together with such additional adjacent land as may be necessary for the convenient use of the buildings thereon.

(7) The exemptions granted in subsections three, four, five, six and ten, of this section shall apply to real property of foreign religious, charitable, educational, literary, benevolent, patriotic or historical corporations, institutions or orders when such property is exclusively used for religious, charitable, educational

or benevolent purposes within this State.

(8) The real property of Indians who are not citizens, except lands held by them by purchase.

(9) Real property falling within the provisions of § 55-11, appropriated ex-

clusively for public parks and drives.

(10) Real property actually used for hospital purposes, including homes for nurses employed by or in training in such hospitals, held for or owned by hospitals organized and operated as nonstock, nonprofit, charitable institutions, without profit to the members or their successors, notwithstanding that patients able to pay are charged for services rendered: Provided, all revenues or receipts of such hospitals shall be used, invested, or held for the purposes for which they are organized; and provided, further, that where hospital property is used partly for such hospital purposes and partly rented out for commercial and business purposes, then only such proportion of the value of such building and the land on which it is located shall be exempt from taxation as is actually used for such hospital purposes. The provisions of this section shall be effective as to taxes for the year one thousand nine hundred and thirty-six and subsequent years. (1930, c. 310, s. 600; 1941, c. 125, ss. 1, 2; 1943, c. 634, s. 2; 1945, c. 995, s. 2.)

Cross Reference.—As to liability of mu- It also struck out the words "or the income nicipal property for county taxes, see note

under § 105-3.

Editor's Note. - The 1941 amendment added present subsection (10) and inserted the reference thereto in subsection (7).

The 1943 amendment rewrote subsection (1) and struck out former subsection (7). therefrom is exclusively used for" formerly appearing after the word "for" in present

The 1945 amendment inserted in subsection (6) the reference to other veterans'

For comment on the 1941 amendment,

see 19 N. C. Law Rev. 520; on the 1943 amendment, see 21 N. C. Law Rev. 371. For article on exemption of property owned by the State and municipal corporations, see 16 N. C. Law Rev. 309.

As to extent of power of the legislature to exempt, see United Brethren v. Forsyth County Com'rs, 115 N. C. 489, 20 S. E. 626 (1894). As to the use to which property devoted being controlling, see State v. Oxford Seminary Const. Co., 160 N. C. 582, 76 S. E. 640 (1912). And see note under

Const., Art. V, § 5.

Property Used for Religious, Charitable, etc., Purposes .- It is fundamental that the property of religious or charitable institutions, to be exempt, must be used exclusively for the purposes enumerated, and the rents arising from such property must be so applied. Southern Assembly v. Palmer, 166 N. C. 75, 82 S. E. 18 (1914). See also, United Brethren v. Commissioners. 115 N. C. 489, 20 S. E. 626 (1894).

Plaintiff association was empowed by its charter inter alia to hold real estate provided the profits therefrom, if any, were used for the benefit of widows and orphans of deceased members or for such charitable and benevolent purposes as it deemed necessary or expedient to the successful prosecution of its charter provisions. During the years 1934 through 1939 it owned a building in which it maintained its lodge rooms and rented the remainder of the building for use as offices and stores on the basis of a commercial enterprise and used the entire rents therefrom for repairs and the payment of the mortgage indebtedness on the building. It was held that since the building was held for business or commercial purposes it was subject to the assessment of ad valorem taxes of the city and county in which it was situate for the years in question. Sir Walter Lodge, etc. v. Swain, 217 N. C. 632, 9 S. E. (2d) 365 (1940).

Same-Former Exemption Held Unconstitutional. - Though the former exemptions contained in subsection (7) were broad enough in their terms to exempt business property owned by an educational institution and rented for offices and business purposes to private enterprises, the net profit derived therefrom being devoted exclusively to educational purposes, they were, when applied to the facts, beyond the scope of the constitutional grant of permissive power of exemption contained in Art. V, § 5 of the Constitution, and therefore the property was subject to ad valorem assessment and taxation. Rockingham County v. Board of Trustees, 219 N. C. 342, 13 S. E. (2d) 618 (1941).

Land Adjacent to Church .- A lot purchased by trustees of a church for the purpose of erecting a new church, and, pending the accumulation of sufficient funds to erect the new church, used exclusively for religious purposes, is property adjacent to the church property and reasonably necessary for the convenient use of the church property within the meaning of subsection (3) exempting such property from taxation, even though the lot purchased, because of unavailability of adjoining land, is four or five blocks distant from the church, the word "adjacent" meaning lying close together but not necessarily in contact. Harrison v. Guilford County, 218 N. C. 718, 12 S. E. (2d) 269 (1940).

Foreign Eleemosynary Corporations .-By an interpretation of a former statute which some thought to be unnecessarily literal, the court had held foreign eleemosynary corporations deprived of the exemptions otherwise granted to such organizations on property used in their work in the State. Catholic Soc. v. Gentry, 210 N. C. 579, 187 S. E. 795 (1936). The exemptions are now granted in specific terms by subsection (7) of this and the following sec-

tion. 15 N. C. Law Rev. 391.

Subsection (10) Retroactive.—Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332 (1942).

Same-Does Not Authorize Refund .-The 1941 act adding subsection (10) to this section and amending § 105-298 contains no provision authorizing refund of taxes theretofore paid by nonprofit hospitals nor machinery for the recovery of such taxes, and therefore a hospital which paid real property taxes for 1940 under protest and unsuccessfully sued for their recovery under § 105-267 is not empowered by the act of 1941 to maintain another suit for the recovery of the same taxes. Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332 (1942).

Plaintiff hospital instituted suit to recover ad valorem taxes for the year 1940, paid by it under protest. On appeal it was held that the hospital was liable for taxes for that year, and final judgment was entered in accordance therewith. Thereafter the hospital, upon the same agreed facts, instituted suit to recover the same taxes, upon its contention that the 1941 amendment exempted its property from taxation retroactively. It was held that the act of 1941, in so far as the status of plaintiff hospital for taxes for the year 1940 was concerned, was an attempt to annul the effect of a final judgment, and was unconstitutional and void. Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332 (1942). See §§ 105-297, 105-298 and notes.

Property of Hospital Held Not Exempt.

The property of a hospital organized as a business corporation and charging all patients according to a fixed schedule is not exempt from taxation, under this section or those immediately following, although patients unable to pay were relieved of payment and classified as charity patients, and although its stockholders, though not waiving their right to dividends, did not except to receive dividends when they subscribed

for stock, and no dividends were paid thereon for the years for which taxes were assessed, the hospital not being a charitable corporation, nor its property used entirely for charitable purposes. Salisbury Hospital v. Rowan County, 205 N. C. 8, 169 S. E. 805 (1933).

Cited in Madison County v. Catholic Society of Religious, etc., Education, 213 N. C. 204, 195 S. E. 354 (1938); Guilford College v. Guilford County, 219 N. C. 347,

13 S. E. (2d) 622 (1941).

§ 105-297. Personal property exempt.—The following personal property and no other shall be exempt from toyetten.

erty, and no other, shall be exempt from taxation:

(1) Personal property, directly or indirectly owned by this State and by the United States, and that lawfully owned and held by the counties, cities, towns, and school districts of the State, used wholly and exclusively for county, city, town, or public school purposes.

(2) The furniture and furnishings of buildings lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any church or religious body, and private libraries of such ministers and the teachers of the public schools of this State.

(3) The furniture, furnishings, books, and instruments contained in buildings wholly devoted to educational purposes, belonging to and exclusively used by churches, public libraries, colleges, academies, industrial schools, seminaries, or other institutions.

(4) The endowment and invested funds of churches and other religious associations, charitable, educational, literary, benevolent, patriotic or historical institutions, associations or orders, when the interest or income from said funds shall be used wholly and exclusively for religious, charitable, educational or benevolent purposes, or to pay the principal or interest of the indebtedness of said associations.

(5) Personal property belonging to Young Men's Christian Associations and other similar religious associations, orphan and other similar homes, reformatories, hospitals, and nunneries which are not conducted for profit and entirely and com-

pletely used for charitable and benevolent purposes.

(6) The furniture, furnishings, and other personal property belonging to the American Legion, or any post thereof, or any other veterans' organization chartered by Congress or organized and operating on a nation-wide or State-wide basis, or any post or other local organization thereof, or any patriotic, historical, or any benevolent or charitable association, when used wholly for lodge or post purposes and meeting rooms by said association or when such personal property is used for charitable or benevolent purposes.

(7) The exemptions granted in subsections two, three, four, five, six and eleven of this section shall apply to personal property of foreign religious, charitable, educational, literary, benevolent, patriotic or historical corporations, institutions or orders when such property is exclusively used or the income therefrom is exclusively used for religious, charitable, educational or benevolent purposes with-

in this State.

(8) Wearing apparel, household and kitchen furniture, the mechanical and agricultural instruments of farmers and mechanics, libraries and scientific instruments, provisions and livestock, not exceeding the total value of three hundred dollars (\$300.00), and all growing crops: Provided, that said three hundred dollars (\$300.00) exemption shall be limited to: (1) each household, consisting of the head of the household and all the dependents, one three hundred dollars (\$300.00) exemption to be distributed among the members of the household as

they see fit; and (2) each single person, not residing with persons on whom he is

dependent, as to eligible property actually owned by him.

(9) The intangible personal property referred to in Schedule H, §§ 105-198 to 105-217, which said intangible personal property shall be taxed or exempt in accordance with the provisions of said Schedule H, §§ 105-198 to 105-217: Provided, that the provisions of this subsection shall not be construed to modify the provisions of article 25 or article 26 of this subchapter.

(10) Tangible personal property held at any seaport destined for and awaiting

foreign shipment.

(11) The furniture, furnishings, books, instruments, and all other tangible or intangible personal property held for or owned by hospitals organized and operated as nonstock, nonprofit, charitable institutions, notwithstanding that patients of such hospitals able to pay are charged for services rendered: Provided, all revenues or receipts of such hospitals shall be used, invested, or held for the purposes for which they are organized. The provisions of this section shall be effective as to any assessment for taxes for the year one thousand nine hundred and thirty-six and subsequent years.

(12) All cotton, tobacco or other farm products owned by the original producer, or held by the original producer in any public warehouse and represented by warehouse receipts, or held by the original producer for any co-operative marketing or grower's association, shall be exempt from taxation for the year

following the year in which grown, but not for any year thereafter.

(13) Any vehicle given by the federal government to any veteran on account of any disability suffered during World War II, so long as such vehicle is owned by the original donee or other veteran entitled to receive such gift under Title 38,

section 252, United States Code Annotated.

(14) All cotton, tobacco or other farm products held or stored for shipment to any foreign country in any seaport terminals in North Carolina or in any city or town in North Carolina in which is located any seaport or within ten miles of the corporate limits of such city or town. (1939, c. 310, s. 601; 1941, c. 125, ss. 3, 4; c. 221, s. 2; 1945, c. 995, s. 3; 1949, cc. 132, 1268.)

Local Modification. — Wayne: 1949, c.

1106.

Editor's Note.—The first 1941 amendment added subsection (11) and inserted reference thereto in subsection (7). The second 1941 amendment added subsection

The 1945 amendment inserted the reference to other veterans' organizations in subsection (6) and made other changes

therein.

The 1949 amendments added subsections

(13) and (14).

For comment on the 1941 amendments, see 19 N. C. Law Rev. 523. For a discussion of the constitutionality of subsections (10) and (13) of this section, see 27 N. C. Law Rev. 486.

Postal Savings. — It may be questioned whether postal savings are not a federal governmental instrumentality immune from State taxation. However, the postal savings system seems more of a business function than a governmental function. See 11 N. C. Law Rev. 260.

Schools bonds of a city in this State in the hands of an investor residing in a county in this State were held not subject to be locally assessed for taxation. Mecklenburg County v. Piedmont Fire Ins. Co., 210 N. C. 171, 185 S. E. 654 (1936), construing former § 7971(19), which was similar to the instant section.

Solvent credits held by a religious society, the income from which is devoted and applied exclusively to educational, religious and charitable purposes, are exempt from taxation. United Brethren v. Commissioners, 115 N. C. 489, 20 S. E. 626 (1894).

Hospital Property.—Under this section and subsection (a) of § 105-298 as they stood before the 1941 amendments, it was held that where a hospital was organized solely for charity, but collected from patients able to pay, and a county levied personal property taxes on the hospital beds, equipment and furnishings, only the personal property used exclusively for charitable purposes was exempt from taxation. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265 (1940). See §§ 105-296, 105-298 and notes.

Cited in Madison County v. Catholic Society of Religious, etc., Education, 213

N. C. 204, 195 S. E. 354 (1938).

8 105-298. Deductions and credits.—(a) Private hospitals shall not be exempt from property taxes and other taxes lawfully imposed, but in consideration of the large amount of charity work done by them, the boards of commissioners of the several counties are authorized and directed to accept, as valid claims against the county, the bills of such hospitals for attention and services voluntarily rendered to afflicted or injured residents of the county who are indigent and likely to become public charges, when such bills are duly itemized and sworn to and are approved by the county physician or health officer as necessary or proper; and the same shall be allowed as payments on and credits against all taxes which may be or become due by such hospital on properties strictly used for hospital purposes, but to that extent only will the county be liable for such hospital bills: Provided. that the board of aldermen or other governing boards of cities and towns shall allow similar bills against the municipal taxes for attention and services voluntarily rendered by such hospitals to paupers or other indigent persons resident in any such city or town: Provided further, that the governing boards of cities and towns shall require a sworn statement to the effect that such bills have not and will not be presented to any board of county commissioners as a debt against that county, or as a credit on taxes due that county. The provisions of this subsection shall not apply to public hospitals or to hospitals organized and operated as nonstock, nonprofit, charitable institutions, which, for the purposes of this subchapter, shall be deemed public hospitals: Provided, however, that nothing in this subsection shall affect the liability of counties, cities, and towns to public hospitals, as herein defined, for services heretofore or hereafter rendered indigent patients or public charges and for which such counties, cities, or towns are or may be otherwise liable.

(b) All bona fide indebtedness incurred in the purchase of fertilizer and fertilizer materials owing by a taxpayer as principal debtor may be deducted from the total value of all fertilizer and fertilizer materials as are held by such taxpayer for his own use in argiculture during the current year: Provided, further, that from the total value of cotton stored in this State there may be deducted by the owner thereof all bona fide indebtedness incurred directly for the purchase of said cotton and for the payment of which the cotton so purchased is pledged as

collateral.

(c) For the purpose of ascertaining and fixing the tax value of any cotton, tobacco, or other farm products, held by or for any co-operative stabilization or marketing association or corporation, to whom the products have been delivered or conveyed or assigned by the original producer for the purpose of sale, there shall be deducted (by any person or corporation liable for the tax thereon) from the determined value of the commodity the amount of any unpaid loan or loans and/or advance or advances of any nature whatsoever made or granted thereon by the United States government or by any agency of the United States government or by any co-operative stabilization or marketing association or corporation. (1939, c. 310, s. 602; 1941, c. 125, s. 5; c. 221, s. 3; 1949, c. 723.)

Local Modification.—Buncombe, Rock-

ingham: 1939, c. 310, s. 602.

Editor's Note. — The first 1941 amendment added the last sentence and proviso of subsection (a). The second 1941 amend-

ment changed subsection (b).

The 1949 amendment added subsection (c) to this section. The amendatory act provides that subsection (c) shall amend all existing statutes, wherever found, which shall in any way be in conflict with or at variance with the provisions of this section, and shall apply to taxes to be listed as of January 1, 1949 and subsequent years.

1941 Amendment Prospective.—The 1941 ramendment, which provides that this sec-

tion shall not apply to nonprofit hospitals, is prospective in effect and not retroactive. Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332 (1942). See §§ 105-296, 105-297 and notes.

Real Property of Private Hospitals Controlled by Section.—The real property of private hospitals is made a separate and distinct classification under subsection (a) of this section and it is the legislative intent that the provisions of this section should control rather than the provisions of § 105-296, subsection (7), exempting from taxation property of churches, religious societies and charitable institutions and orders, the language of said subsection (7), strictly

construed, not being sufficiently broad to include property of private hospitals in view of the fact that subsection (a) of this section specifically deals with property of such institutions. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265 (1940). See the effect of the 1941 amendments to this section and § 105-296

Distinction between Private and Public Hospitals.—Before the 1941 amendment to this section it was held that, in determining the question of exemption from taxation, a nonprofit hospital established solely for charitable purposes through individual donations, and which was governed by a self-perpetuating board of trustees named by the incorporators, was a private hospital as contradistinguished from a public hospital, which was one supported, maintained and controlled by public authority, and the distinction observed between charitable hospitals and those operated for gain or

profit in determining liability for negligence, had no bearing in determining the question of tax exemption. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265 (1940).

Use of Building Owned by Hospital .-Where the first floor of plaintiff's building was rented out for stores and shops, the second floor was rented for offices for physicians and surgeons, and the third and fourth floors were used for a hospital, as to the first two floors, it was held that the General Assembly is without authority to grant any exemption from taxation, and as to the third and fourth floors, subsection (a) of this section as it stood before the 1941 amendment was held applicable, and bills for services rendered the indigent poor could be allowed as a credit on taxes levied against this part of the property, but it was not exempt from taxation. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265 (1940).

§ 105-299. Article subordinate to §§ 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 603.)

ARTICLE 17.

Real Property-Where and in Whose Name Listed.

§ 105-300. Place for listing real property.—All real property subject to taxation, and not hereinafter required to be assessed originally by the State Board of Assessment, shall be listed in the township or place where such property is situated. (1939, c. 310, s. 700.)

§ 105-301. In whose name real property to be listed; information regarding ownership; permanent listing.—(1) Except as hereinafter specified, real property shall be listed in the name of its owner; and it shall be the duty of the owner to list the same. To this end the board of county commissioners in any county may require the register of deeds, when any transfer of title is recorded, other than a mortgage or deed of trust, to certify the same to the supervisor (or if there be no supervisor acting at the time, to the person in charge of the tax records), and the record of the transfer shall be entered upon the tax records. The certification from the register to the supervisor or other person shall include the name of the person conveying the property, the name of the person to whom it is conveyed, the township in which the property is situated, a description of the property sufficient to identify it, and a statement as to whether the parcel is conveyed in whole or in part. For his services in this respect the register shall be allowed, if on fees, the sum of ten cents (10c) per transfer certified, to be paid by the county, and if on salary, such allowance as may be made by the board of commissioners.

It shall also be within the power of any board of commissioners, in its discretion, to require that each person recording such conveyance of real property shall, before presenting it to the register of deeds, present it to the person in charge of the tax records, in order that the conveyance may be noted on the tax records and in order that adequate information concerning the location of the property may be obtained from the person recording the conveyance. If such presentation is required by the

commissioners of any county, the register of deeds of that county shall not accept for recording any conveyance which has not first been submitted to the person in charge of the tax records and such person has obtained information for the tax records which he regards as satisfactory. The commissioners may allow the person in charge of the tax records such compensation for this service as they deem appropriate, but they shall not require the person presenting the deed to pay any fee therefor.

It shall also be within the power of the commissioners to authorize the installation of a system for the permanent listing of real estate, under which all real estate may be carried forward by the supervisor, the list takers or some person or persons designated by the supervisor, in the name of the proper person as defined by this subchapter, without requiring that such real estate be listed each year by such person. No such system shall be installed without the approval of the State Board of Assessment; and when such a system is installed, with the approval of the Board, the Board may authorize the commissioners to make such modifications of the listing requirements of this subchapter as the Board may deem necessary: Provided, that nothing herein shall require the Board's approval for any such system installed prior to April 3, 1939.

Any county may, in the discretion of the commissioners, require that all real estate be listed only in the name of the owner of record at the close of the day as of which property is listed and assessed.

(2) For purposes of tax listing and assessing, the owner of the equity of redemption in any property which is subject to a mortgage or deed of trust shall be considered the owner of such real estate.

(3) Real property of which a decedent died possessed, not under the control of an executor or administrator, may be assessed to the heirs or devisees of the deceased without naming them until they have given notice of their respective names to the supervisor and of the division of the estate. It shall be the duty of any executor or administrator having control of real property to list it in his fiduciary capacity until he shall have been divested of control of such property. The right of an administrator, administering upon the estate of an intestate decedent, to petition for the sale of real estate to make assets shall not be considered as control of such real estate for purposes of this subdivision.

(4) A trustee, guardian or other fiduciary having legal title to real property shall be regarded as the owner of such property for purposes of tax listing, except as elsewhere in this section provided, and he shall list such property in his fiduciary capacity.

(5) Where undivided interests in real property are owned by tenants in common, not being copartners, the supervisor, upon request and in his discretion, may allow the property to be listed by the respective owners in accordance with their respective undivided interests.

(6) Real property belonging to a partnership or unincorporated association shall be listed in the name of such partnership or association.

(7) Real property owned by a corporation shall be listed in the name of the

(8) When land is owned by one party and improvements thereon or mineral, timber, quarry, water power, or similar rights therein are owned by another party, the parties may list their interests separately or may, in accordance with contractual relations between them, have the entire property listed in the name of the owner of the land. Where in such a case the land and improvements or rights are listed by the separate owners, the taxes levied on the improvements, or rights, shall be a lien on the land, and the land shall be subject to foreclosure for nonpayment of such taxes in the same manner as if such taxes were levied directly against said land: Provided, nothing herein contained shall prevent said taxes from being also a lien on said improvements, or rights.

(9) A life tenant or tenant for the life of another shall be considered the owner

of real property for purposes of tax listing, but he shall indicate when listing such property that he is a life tenant. The taxes levied on property listed in the name of a life tenant shall be a lien on the entire fee: Provided, that this shall not

prevent the life tenant from being liable for the taxes under § 105-410.

(10) If the owner or person in whose name the real property should properly be listed, as set forth in the foregoing subdivisions of this section, is unknown, the property may be listed in the name of the occupant, and either or both shall be liable for the taxes; and if there be no occupant, then it may be listed as property the owner of which is unknown: Provided, that wherever the property is so listed against the occupant or an unknown owner, or through error the property has been listed against some person other than the owner as defined in this section, and the name of the true owner is subsequently ascertained, the tax records may be changed so as to list said property against the owner, and the change shall have the same force and effect as if the property has been listed against the owner in the first instance. (1939, c. 310, s. 701.)

Editor's Note.—All of the cases in the following note were decided under earlier statutes similar in subject matter to this section.

In Whose Name Listed .- Land should be listed for taxation in the name of the individual owners and not in the name of the "estate" of one deceased. Morrison v. McLauchlin, 88 N. C. 251 (1883)

Improper Listing as Affecting chaser's Title. - A tax title devised by a purchaser at a sheriff's sale of land listed in the name of the "estate" of one deceased was held defective. Morrison v. Mc-Lauchlin, 88 N. C. 251 (1883). See § 105-387, subsection (i).

Unless the land is properly listed for taxation, it is not subject to sale by the sheriff for nonpayment of taxes. Stone v. Phillips, 176 N. C. 457, 97 S. E. 375 (1918).

Where land, listed in the name of one person, and belonging to another, had been sold for unpaid taxes and it was discovered, before the deed had been accepted, that the real owner had not listed it as required by the former statute, the deed was insufficient to pass title, for the methods provided by the statute must be followed. Wake County v. Faison, 204 N. C. 55, 167 S. E. 391 (1933). See § 105-387, subsection (i).

Where Entry Copied from Former Tax Book.-In Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337 (1912), neither the owner nor his agent had given in the land, and list taker had copied the entry from the former tax book, and it was held that the land was not rightfully on the tax list, and a sale for taxes pursuant thereto was invalid. This case is discussed with approval in Stone v. Phillips, 176 N. C. 457, 97 S. E. 375 (1918).

Cited in Bemis Hardwood Lbr. Co. v. Graham County, 214 N. C. 167, 198 S. E.

843 (1938).

ARTICLE 18.

Personal Property-Where and in Whose Name Listed.

§ 105-302. Place for listing tangible personal property.—(1) In general, all tangible personal property and polls shall be listed at the residence of the owner, except as otherwise provided in this section. For purposes of this section the residence of a person who has two or more places in which he occasionally dwells shall be the place at which he resided for the longest period of time during the year preceding the date as of which property is assessed. The residence of a corporation, partnership or unincorporated association, domestic or foreign, shall be the place of its principal office in this State, and if a corporation, partnership or unincorporated association has no principal office in this State, its tangible personal property may be listed at any place at which said property is situated provided said property has a taxable situs within the State.

(2) Farm products produced in this State, owned by the producers, shall be

listed where produced.

(3) Tangible personal property taxable in this State, owned by an individual

nonresident of this State, shall be listed where situated.

(4) Subject to the provisions of subsection (2) of this section, tangible personal property shall be listed at the place where such property is situated, rather than at the residence of the owner, if the owner or person having control thereof hires or occupies a store, mill, dockyard, piling ground, place for the sale of property, shop, office, mine, farm, place for storage, manufactory or warehouse therein for use in connection with such property. Property stored in public warehouses and merchandise in the possession of a consignee or broker shall be regarded as falling within the provisions of this subdivision. When tangible personal property, which may be used by the public generally or which is used to sell or vend merchandise to the public, is placed at or on a location outside of the county of the owner or lessor, such tangible personal property shall be listed for taxation in the county where located.

(5) The tangible personal property of a decedent whose estate is in the process of administration or has not been distributed shall be listed at the place at which it would be listed if the decedent were still alive and still residing at the

place at which he resided at the time of his death.

(6) Tangible personal property held by a trustee, guardian or other fiduciary having legal title thereto shall be listed at the place where such property would be listed if the beneficiary were the owner; and if there are several beneficiaries in a case in which such property would be listed at the residence of the owner, the value of the property shall be listed at the various residences of the beneficiaries in accordance with their respective interests. This subdivision shall affect only cases in which the beneficiaries are residents of this State, but it shall apply whether the fiduciary is a resident or nonresident of this State. Property delivered by executors or administrators to themselves or others as testamentary trustees shall be controlled by this subsection rather than by subsection (5) of this section.

(7) In any case where the beneficiary is a nonresident of this State, tangible personal property having a taxable situs in this State, held by a trustee, guardian or other fiduciary having legal title, shall be listed at the place it would be listed if the trustee or other fiduciary were the beneficial owner of such property.

(1939, c. 310, s. 800; 1947, c. 836.)

Editor's Note.—The 1947 amendment added the last sentence of subsection (4).
All of the cases in the following note were decided under earlier statutes similar in subject matter to this section.

Uniform Rule Established. — The rules and regulations fixed by the "Revenue Act" and the "Machinery Act" for the guidance of the officers charged with the listing and assessment of property for purposes of State taxation govern and control the action of county and other municipal officers charged with the listing and assessment of property for municipal taxation. The conclusion, therefore, is that the legislature has adopted a "uniform rule" which must be observed. Wiley v. Commissioners, 111 N. C. 397, 16 S. E. 542 (1892).

It is for the legislature to determine the situs of personal property for purposes of taxation, and it may provide different rules for different kinds of property, and change them from time to time, and the courts may not, for consideration of expediency, disregard the legislative will. Planters Bank, etc., Co. v. Lumberton, 179 N. C. 409, 102 S. E. 629 (1920).

Application of Maxim Mobilia Personam Sequentur.—In Alvany v. Powell, 55 N. C. 51 (1854), Chief Justice Pearson declares that the true principle, upon which to determine whether personal property is liable to be taxed, is the situs of the property, and that the distinction attempted to be made between personalty and real estate, depending upon the domicile of the owner, is based upon a fiction which has no application to questions of revenue.

Property of Corporation Taxable at Principal Office.—Where a corporation had its place of business and principal office in one town, with a part of the personal property located in another town, it was held that such property was only taxable in the town where the place of business and principal office were located. The same was said to be true of a partnership. Winston v. Salem, 131 N. C. 404, 42 S. E. 889 (1902).

Property Held by Executors and Trustees.—Where a testator appointed executors of his will who were also therein named as trustees for certain beneficiaries, who moved to another town, after the matters of executorship had been closed, leaving those of the trusteeship continuing, it was held, under a former statute, that the personal property should have been listed at the place of residence of the beneficiaries; and the taxes not having been

listed at all, it was proper for the commissioners of the town of residence of the beneficiaries to cause the personalty to be listed there and impose the penalty prescribed by law. Smith v. Dunn, 160 N. C. 174, 76 S. E. 242 (1912).

As to residence and domicile under former laws, see Roanoke Rapids v. Patterson, 184 N. C. 135, 113 S. E. 603 (1922); Ransom v. Board, 194 N. C. 237, 139 S. E. 232 (1927).

At the time of listing tangible personal property, every person, firm, or corporation engaged in business in more than one county in this State and maintaining in more than one county in this State goods, wares, merchandise and other taxable personal property shall, upon request of the tax supervisor of any county, furnish to the tax listing authorities of such county, in addition to any other inventory, list or report required by article 18 of chapter 105 of the General Statutes, a certificate, subscribed and sworn to by a duly authorized agent having knowledge of the facts, containing a list of the counties in which goods, wares, merchandise or other taxable personal property held in connection with such business are located and the true value of such taxable personal property in each such county and the total value of such taxable personal property owned in this State. (1947, c. 892; 1949, c. 930.)

Editor's Note.—The 1949 amendment rewrote this section.

For comment on this section, see 25 N. C. Law Rev. 463.

§ 105-303. Intangible personal property.—The listing, assessing, and taxation of intangible personal properties and the administration relative thereto shall be subject to the provisions of Schedule H, §§ 105-198 to 105-217. (1939, c. 310, s. 801.)

§ 105-304. In whose name personal property should be listed.—
(1) In general, personal property shall be listed in the name of the owner thereof on the day as of which property is assessed; and it shall be the duty of the owner to list the same. The owner of the equity of redemption in personal property subject to a chattel mortgage shall be considered the owner of the property; and the vendee of personal property under a conditional bill of sale, or under any other sale contract by virtue of which title to the property is retained in the vendor as security for the payment of the purchase price, shall be considered the owner of the property, provided he has possession of such property or the right to use the same.

(2) Personal property of a corporation, partnership, firm or unincorporated association shall be listed in the name of such corporation, partnership, firm, or

unincorporated association.

(3) Personal property of which a decedent died possessed, not under the control of an executor or administrator, may be assessed to the next of kin or legatees of the decedent without naming them until they have given notice of their respective names to the supervisor and have likewise given notice of the distribution of the estate; and for this purpose such next of kin or legatees may be designated as "heirs." It shall be the duty of an executor or administrator having control of such property to list it in his fiduciary capacity until he shall have been divested of such control.

(4) A trustee, guardian, or other fiduciary having legal title to personal prop-

erty shall be regarded as the owner thereof for purposes of this section.

(5) In cases in which two or more persons are joint owners of personal prop-

erty, each shall list the value of his interest.

(6) If any dispute shall arise as to the true owner of personal property, the person in possession thereof shall be regarded as the owner unless the list taker or supervisor shall be convinced that some other person is the true owner. (1939, c. 310, s. 802.)

§ 105-305. Article subordinate to §§ 105-198 to 105-217.—None of

the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 803.)

ARTICLE 19.

What the Tax List Shall Contain and Miscellaneous Matters Affecting Listing.

8 105-306. What the tax list shall contain.—Each taxpaver or person whose duty it is to list property for taxation shall file with the proper list taker a tax list setting forth, as of the day on which property is assessed, the following information:

(1) The name and residence address of the taxpaver.

(2) The age of the taxpayer, if he is a male taxpayer, listing in the township of his residence.

(3) Each parcel of real property owned or controlled in the township, not subdivided into lots, together with the number of acres cleared for cultivation, wasteland, woods and timber, mineral, quarry lands, and lands susceptible of development for water power, and the total acreage. Each separate parcel shall be described by name, if it has one, and by specifying at least two adjoining landowners, or by such other description as shall be sufficient to locate and identify said land by parol testimony. If all or part of such land shall lie within the boundaries of any incorporated town or any district in which a special tax is levied, such fact shall be specified.

(4) Each parcel of manufacturing property owned or controlled in the township, not subdivided into lots, together with the number of acres in said parcel or the dimensions thereof, the name of such parcel, if any, and the names of at least two adjoining landowners, or such other description as shall be sufficient to locate and identify said property by parol testimony. If all or part of such land shall lie within the boundaries of any incorporated town or any district in which a special tax is levied, such fact shall be specified.

(5) Each lot owned or controlled in the township together with the dimensions of said lot, the location of said lot, its street number, if any, its number or location on any map filed in the office of the register of deeds or such other description as shall be sufficient to locate and identify it by parol testimony. If any such lot shall lie within the boundaries of an incorporated town or any district in which a

special tax is levied, such fact shall be specified.

- (6) In conjunction with the listing of any real property listed under subdivisions (3), (4), or (5) of this section, a short description of any improvements thereon, belonging to the taxpayer listing such real property, shall be given. And if some person other than the taxpayer listing such real property shall own mineral, quarry, timber, water power or other separate rights with respect thereto, or shall own any improvements thereon, such fact shall be specified, together with the name of the person owning such rights or improvements, and a short description of such rights or improvements; though the owner of the land may or may not list separate rights or improvements for taxes in accordance with the provisions of this subchapter.
- (7) All mineral, quarry, timber, water power or other separate rights owned by the taxpayer with respect to the lands of another, and all improvements owned by such taxpayer located upon the lands of another. Such rights or improvements shall be listed separately with respect to each parcel or lot of land which is listed separately by the owner thereof, and such parcel or lot shall be identified in the same manner as it is identified on the tax list of the person listing the same: Provided, that such rights or improvements shall not be taxed against the owner thereof if, under the provisions of this subchapter, they are listed for taxes by the owner of the land.
 - (8) Every person listing real property shall list, in connection with each parcel

or lot, every encumbrance thereon, together with the amount due on such encumbrance and the name and address of the person to whom such amount is due.

(9) The amount and value of all machinery and fixtures.

(10) A special description of any improvements, having a value in excess of one hundred dollars (\$100.00), which have been begun, erected, damaged or destroyed since the time of the last assessment of such property.

(11) A list of horses, mules, jacks and jennets, cattle, hogs, sheep, goats and other livestock, poultry and dogs, with the number and value of each class shown

separately.

(12) The number of open female dogs and the number of other dogs.

(13) The amount and value of farm machinery, farm utensils, and carriages, carts, wagons, buggies, or other vehicles and harness.

(14) The amount and value of household and kitchen furniture, libraries, scientific instruments, tools of mechanics, wearing apparel, and provisions of all kinds.

(15) The amount and value of merchandise, manufactured goods, or goods in the process of manufacture. This subdivision is intended to include all tangible personal property whatever held for the purpose of sale or exchange or held for use in the business of the taxpayer.

(16) The amount and value of all office furniture, fixtures and equipment.

(17) The number and value of all motor vehicles, tractors, trailers, bicycles, flying machines, pleasure boats of any and all kinds, and their appliances.

(18) The number and value of all seines, nets, fishing tackle, boats, barges,

schooners, vessels, and all other floating property.

(19) The number and value of billboards and signboards and the value of other property used in outdoor advertising.

(20) The number and value of radios, talking machines and musical instru-

- (21) The value of plated or silverware, clocks, watches, firearms and jewelry. (22) The amount and value of all cotton, tobacco or other farm products owned
- by the original producer, or held by the original producer in any public warehouse and represented by warehouse receipts, or held by the original producer for any co-operative marketing or grower's association, together with a statement of the amount of any advance against said products: Provided, the same need not be listed if grown in the preceding year, and shall not be subject to taxation for the year following the year in which grown, but shall be listed and taxed for any year thereafter.

(23) The amount and value of all other cotton, tobacco or other farm products.

(24) The amount and value of all fertilizer and fertilizer materials.

(25) The value and a description of all other property whatever, not especially exempted by law.

(26) An itemized list of any type of personal property when such itemization

is required by the list taker or supervisor.

(27) A statement setting forth a list of license taxes for which the person, firm or corporation listing may be liable to the State under the provisions of Schedule "B", §§ 105-33 to 105-113; and also a statement of liability for tax on intangible personal property owned.

(28) The oath of the taxpayer hereinafter set forth. (1939, c. 310, s. 900; 1941,

c. 221, s. 1.)

Editor's Note.—The 1941 amendment added the proviso to subsection (22).

The cases in the following note were decided under earlier statutes similar in subject matter to this section.

Compliance with Statutory Procedure Essential.—The listing of property must be done in the manner prescribed by the statute. Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337 (1912). This means that the listing must be done by the owner or by his duly accredited agent in cases where listing by an agent is permissible. Stone v. Phillips, 176 N. C. 457, 97 S. E. 375 (1918).

Time of Making List.—Under an earlier statute it was held that property can be listed for taxation only in the year, and for the year, in which taxes are due. North Carolina R. Co. v. Commissioners, 77 N. C. 4 (1877); Johnson v. Royster, 88 N. C. 194 (1883).

Sufficiency of Description.-The listing of land as a certain number of acres lying in a named township was held too vague to support a valid assessment, the land being insufficiently described. Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337 (1912).

Same-As between Taxpayer and Purchaser.—A description on a tax list made under the direction of the taxpayer in the words, "Tax list in No. 2 township,

county, for the year 1893," was held sufficient, as between the taxpayer and a purchaser of his land at a tax sale, where it was the only land owned by the former in the townships. Fulcher v. Fulcher, 122 N. C. 101, 29 S. E. 91 (1898).

Under the act of 1784 if the owner failed to attend at the time and place appointed to receive the lists of taxable property, the justice could make out a list for himself to the best of his knowledge. Tores v. Jus-

tices, 6 N. C. 167 (1812).

§ 105-307. Duty to list; penalty for failure.—It shall be the duty of every person, firm or corporation, in whose name any property or poll is to be listed under the terms of this subchapter, to list said property or poll with the proper list taker or the supervisor, within the time allowed by law, on a list setting forth the information required by this subchapter. In addition to all other penalties prescribed by law, any person, firm or corporation whose duty it shall be to list any poll or property, real or personal, who willfully fails, refuses or neglects to list the same within the time allowed by law, or who removes or conceals property for the purpose of evading taxation, shall be guilty of a misdemeanor; and any person, firm or corporation aiding or abetting the removal or concealment of property for the purpose of evading taxation shall be guilty of a misdemeanor. The failure to list shall be prima facie evidence that such failure was willful, and the board of county commissioners shall present the names of all such persons, firms and corporations to the grand jury. (1939, c. 310, s. 901.) Cross References.—As to failure to file solvent credits under former law, see note

return and pay tax on intangible property, see § 105-207. As to effect of failure to list

to § 105-202.

§ 105-308. Oath of the taxpayer.—Before accepting any completed tax list, it shall be the duty of the list taker to read and actually to administer the following oath (or so much thereof as may be pertinent) which shall be subscribed

by the person filing the list:

"I,, do solemnly swear (or affirm) (that I am an officer or agent of the taxpayer named on the attached list, that as such I am duly authorized to submit said list, that I am familiar with the extent and value of all said taxpayer's property subject to taxation in this township) that the above and foregoing list is a full, true and complete list of all and each kind of property which it is the duty of the above named taxpayer to list as owner or fiduciary, as said list indicates, in Township, County, North Carolina; and that I have not in any way connived at the violation or evasion of requirements of law in relation to the assessment of property; so help me, God.

(Signature)

So much of the foregoing oath as appears in the second parentheses shall be used only in cases in which the list is submitted by an officer or agent. Any list taker who accepts a list without administering said oath shall be guilty of a misdemeanor. (1939, c. 310, s. 902.)

§ 105-309. Listing by agents.—Corporations, partnerships, firms and unincorporated associations, females, nonresidents of the township in which the property is to be listed, and persons physically unable to attend and file a list may have their lists submitted and sworn to by an officer or agent; but the list shall be filed in the name of the principal. (1939, c. 310, s. 903.)

Editor's Note.—As to irregularity in listing taxes by agent as affecting tax sales under former law, see Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337 (1912).

- § 105-310. Listing by mail.—All tax lists submitted by mail must be accompanied by the oath of the taxpayer, as prescribed in this subchapter, duly sworn to before a notary public or other officer authorized to administer oaths, and must be mailed to the supervisor. The supervisor may accept or reject any such list in his discretion. (1939, c. 310, s. 904.)
- § 105-311. Length of the listing period; preliminary work.—Tax listing shall begin on the day as of which property is assessed (or on the first business day thereafter if said day is a Sunday or a holiday) and shall continue for thirty days. The board of county commissioners of any county may extend the time for listing for not more than an additional thirty days: Provided, that in years of quadrennial assessment the board of county commissioners may extend the time for listing for not more than an additional sixty days. Nothing in this section shall be construed to prevent any preparatory work, prior to the beginning of listing, which may be necessary or expedient in connection with an efficient listing or assessing of property; nor shall it prevent the assessment of real property by the list takers prior to the actual time at which it is listed by its owner or carried forward on the tax records: Provided, that no final assessment shall be made by a list taker prior to the day as of which property is required by law to be assessed. (1939, c. 310, s. 905.)
- § 105-312. Records of tax exempt property.—The person making up the tax records shall enter, in regular order, the name of the owner, a clear description of all real and personal property exempt from taxation, together with a statement of its value, for what purpose used, and the rent, if any, obtained therefrom. Each list taker shall secure the necessary information with respect to such property in his township. The list of such exempt property, when completed, shall be delivered by the county supervisor of taxation to the register of deeds of the county on or before the first day of October, and the register of deeds, on or before the first day of November, shall make duplicates thereof and transmit such duplicates to the State Board of Assessment and shall file the original list of exempt property in his office. (1939, c. 310, s. 906.)
- § 105-313. Forms for listing and assessing property.—All forms and books used in the listing and assessing of property for taxation shall have the approval of the State Board of Assessment. The Board may, in its discretion, design and prescribe such forms and make arrangements for their purchase and distribution through the Division of Purchase and Contract, the cost of same being billed to the counties. (1939, c. 310, s. 907.)
- § 105-314. Article subordinate to §§ 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 908.)
- § 105-314.1. Certain new motor vehicles in dealers' stock may be assessed at reduced value during war.—While the existing state of war continues between the United States and any foreign nation, any dealer in motor vehicles who has in stock on January first a new model motor vehicle, the sale of which is subject to priorities, rationing and restrictions by federal government regulations on account of the war, shall be classified as war restricted motor vehicles and the governing bodies of the tax assessing units of the several counties are hereby authorized in their discretion to assess same for taxation at a reduced value. (1943, c. 81.)

ARTICLE 20.

Special Provisions Affecting Motor Vehicle Owners, Warehousemen, etc.

§ 105-315. Information to be given by motor vehicle owners apply-

ing for license tags.—Every motor vehicle owner applying to the State Department of Motor Vehicles for motor vehicle license tags shall specify in the application the county in which each such motor vehicle is subject to ad valorem taxation. If any such vehicle is not subject to ad valorem taxation in any county of this State, such fact, with the reason therefor, shall be stated in the application. No State license tags shall be issued to any applicant until the requirements of this subdivision have been met. The Commissioner of Motor Vehicles shall, upon request from any county, send to the supervisor of such county a list of motor vehicles subject to ad valorem taxation in such county as shown by the Commissioner's records of applications filed during the year preceding the day as of which property is to be assessed, and shall charge the county the sum of thirty cents (30c) per hundred names for the same, said amount to be used by the Commissioner as compensation for the preparation of said list. (1939, c. 310, s. 1000; 1941, c. 36, s. 4.)

Cross Reference.—For similar provision vehicles to county authorities, see § 105-relating to duty to furnish lists of motor 426.

- § 105-316. Warehouses and co-operative growers' or marketing associations to furnish lists.—(1) Every warehouse company or corporation and every growers' or marketing association receiving for storage cotton, tobacco or other products, commodities or property, and issuing warehouse receipts for same, shall, on the day as of which property is assessed, furnish to the supervisor of the county in which such property is stored a full and complete list of all persons, corporations, partnerships, firms or associations for whom such property is stored, except in cases in which farm produce is stored for its original producer who is a resident of another county in this State, together with the amount of such property by the warehouse or association. In all cases in which farm produce is stored for its original producer, who is a resident of another county in this State, the names of such producers shall be sent to the supervisors of the respective counties in which such producers reside, together with the amount of such produce stored for them and the amount advanced against such produce by the warehouse or association.
- (2) Warehouse companies and corporations and growers' and marketing associations shall not be liable for taxation on the property stored with them by others, provided lists of the owners and amounts of such property are furnished to the respective supervisors under the provisions of subdivision (1) of this section. If such lists are not so furnished within fifteen days after the day as of which property is assessed, such warehouse or association shall be liable to the respective counties for the tax upon the full value of such property; and if failure to furnish such list is continued for ten days after demand for same by the supervisor of any county, such warehouse or association shall be liable for a penalty of two hundred fifty dollars (\$250.00), in addition to the taxes, to be recovered by the proper county in an action in the superior court, and both tax and penalty may be recovered in the same action. (1939, c. 310, s. 1001.)
- § 105-317. Reports by consignees and brokers.—Every person, corporation, partnership, or unincorporated association in possession of property on consignment, and all brokers dealing in tangible personal property who have in their possession such property belonging to others, shall file with the supervisor of taxation of the county in which such property is located a full and complete list of the owners of such property, together with the amount of such property owned by each: Provided, that if such property is farm produce owned by the original producer, who is a resident of this State, the name of the owner and the amount of such property shall be reported to the supervisor of the county of which such owner is a resident. Consignees and brokers failing to make such reports shall be liable to payment of the tax, and a penalty of two hundred fifty

dollars (\$250.00), in the same manner and under the conditions set forth in subdivision (2) of § 105-316. (1939, c. 310, s. 1002.)

§ 105-318. Private banks, bankers, brokers and security brokers. -Every bank (not incorporated), banker, broker or security broker, at the time fixed by this subchapter for listing and assessing all real and personal property, shall make out and furnish to the list takers and assessors a sworn statement show-

(1) The amount of property on hand and in transit.

(2) The amount of funds owned in the hands of other banks, bankers or brokers.

(3) The amount of checks or other cash items, the amount of which is not

included in either of the preceding items.

(4) The amount of bills receivable, discounted or purchased, bonds and other credits due or to become due, including interest receivable and accrued, but not due, and interest due and unpaid.

(5) All other property appertaining to said business, other than real estate,

which real estate shall be listed under this subchapter.

(6) The amount of deposits made with them by any other person, firm or

corporation.

- (7) The amount of all accounts payable, other than current deposit accounts. (1939, c. 310, s. 1003.)
- § 105-319. Persons, firms, banks and corporations dealing in securities on commission taxed as a private banker.—No person, bank, or corporation, without a license authorized by law, shall act as a stockbroker or private banker. Any person, bank, or corporation that deals in foreign or domestic exchange, certificates of debt, shares in any corporation or charter companies, bank or other notes, for the purpose of selling the same or any other thing for commission or other compensation, or who negotiates loans upon real estate securities, shall be deemed a security broker. Any person, bank, or corporation engaged in the business of negotiating loans on any class of security or in discounting, buying or selling negotiable or other papers or credits, whether in an office for the purpose or elsewhere, shall be deemed to be a private banker. Any person, firm, or corporation violating this section shall pay a fine of not less than one hundred nor more than five hundred dollars for each offense. (1939, c. 310, s. 1004.)
- § 105-320. Partnerships; liability of partners for tax.—For the purpose of listing and assessing property, a copartnership shall be treated as an individual, and its property, real and personal, shall be listed in the name of the firm. Each partner shall be liable for the whole tax. (1939, c. 310, s. 1005.)
- § 105-321. Article not to be construed in conflict with §§ 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 1006.)

ARTICLE 21.

Procedure Subsequent to the Close of the Tax Listing Period.

§ 105-322. Review of abstracts by supervisor and list takers .-After the close of the list taking period, and not later than the first meeting of the board of equalization and review, the supervisor shall examine the abstracts turned in by each list taker, and, unless he is satisfied that said list taker has satisfactorily performed the duties of a list taker, shall not approve payment of any compensation to said list taker.

The supervisor shall meet with each of the list takers not later than the first meeting of the board of equalization, for the purpose of reviewing the abstracts generally to ascertain if the same scales of value have been used in all townships in the county, and if property has been listed at the valuation prescribed by law. (1939, c. 310, s. 1100.)

§ 105-323. Making up the tax records.—The list takers for their respective townships, or such other persons as the commissioners may designate, shall make out, on forms approved by the State Board of Assessment, tax records which may consist of a scroll designed primarily to show tax valuations and a tax book designed primarily to show the amount of taxes or may consist of one record designated to show both valuations and taxes. Such records for each township shall be divided into four parts: (1) White individual taxpayers (including lists filed by corporate fiduciaries for white individual beneficiaries); (2) colored individual taxpayers (including lists filed by corporate fiduciaries for colored individual beneficiaries); (3) Indian individual taxpavers (including lists filed by corporate fiduciaries for Indian individual beneficiaries); and (4) corporations, partnerships, business firms and unincorporated associations. Such records shall show at least the following information:

(a) The name of each person whose property is listed and assessed for taxation, entered in alphabetical order.

(b) The amount of valuation of real property assessed for county-wide purposes (divided into as many classes as the State Board may prescribe).

(c) The amount of valuation of personal property assessed for county-wide purposes (divided into as many classes as the State Board may prescribe).

(d) The total amount of real and personal property valuation assessed for county-wide purposes.

(e) The amount of ad valorem tax due by each taxpayer for county-wide purposes.

(f) The amount of poll tax due by each taxpayer. (g) The amount of dog tax due by each taxpayer.

- (h) The amount of valuation of property assessed in any special district or subdivision of the county for taxation.
- (i) The amount of tax due by each taxpayer to any special district or subdivision of the county.

(i) The total amount of tax due by the taxpayer to the county and to any

special district, subdivision or subdivisions of the county.

All changes in valuations affected between the close of the listing period and the meeting of the board of equalization and review shall be reflected on such records, and so much of such records as may have been prepared shall be submitted to the board at its meetings. Changes made by said board shall also be reflected upon such records, either by correction, rebate or additional charge. (1939, c. 310, s. 1101.)

§ 105-324. Tax receipts and stubs.—Such persons as the county commissioners may designate shall fill out the receipts and stubs for all taxes charged upon the tax books. The form of such receipts and stubs shall be approved by the State Board of Assessment and shall show at least the following:

(a) The name of the taxpayer charged with taxes.

- (b) The amount of valuation of real property assessed for county-wide purposes.
- (c) The amount of valuation of personal property assessed for county-wide purposes.
- (d) The total amount of valuations of real and personal property assessed for county-wide purposes.

(e) The rate of tax levied for each county-wide purpose, the total rate for all

county-wide purposes, and the rate levied for any special district or subdivision of the county, which tax is charged to the taxpaver.

(f) The amount of the valuation of property assessed in any special district or

subdivision of the county.

(g) The amount of ad valorem tax due by the taxpaver for county-wide purposes.

(h) The amount of poll tax due by the taxpayer. (i) The amount of dog tax due by the taxpayer.

(i) The amount of tax due by the taxpayer to any special districts or subdivisions of the county.

(k) The total amount of tax due by the taxpayer to the county and to any special district, subdivision or subdivisions of the county.

(1) Amount of discounts.

(m) Amount of penalties. (1939, c. 310, s. 1102.)

8 105-325. Disposition of tax records and receipts.—The tax records shall be filed in the office of the supervisor or official computing the taxes of the office of the accountant or clerk to the board of commissioners, as the commissioners may direct. The tax receipts and stubs shall be delivered to the sheriff or tax collector on or before the first Monday in October of the year one thousand nine hundred thirty-nine, and annually thereafter, provided he has made settlement as by law required, and the sheriff or tax collector shall receipt for the same. In the discretion of the commissioners, a duplicate copy of the tax books may be made and delivered to the sheriff or tax collector at the same time.

A list of all appeals pending before the State Board of Assessment shall be delivered with said receipts; and there shall be delivered with said receipts an order. a copy of which shall be spread upon the minutes of the commissioners, directing the sheriff or tax collector to collect said taxes, which order shall have the force and effect of a judgment and execution against the property, real and personal, charged in the tax book and receipts, and shall be in substantially the following

form:

"North Carolina, County, City. To the Sheriff or Tax Collector of County, or City, or Town:

You are hereby authorized, empowered and commanded to collect the taxes set forth in the tax books, filed in the office of, and in the tax receipts herewith delivered to you, in the amounts and from the taxpayers likewise therein set forth, and such taxes are hereby declared to be a first lien on all real property of the respective taxpayers in County, or City or Town, and this order shall be a full and sufficient authority to direct, require and enable you to levy on and sell any real or personal property of such taxpayers, for and on account thereof, in accordance with law.

Witness my hand and official seal, this day of, 19... (Seal) Chairman, Board of Commissioners.

Attest:

Clerk of Board." (1939, c. 310, s. 1103.)

§ 105-326. Compensation of officer computing taxes.—The board of county commissioners shall make an order for the payment to the register of deeds, auditor, tax clerk, supervisor, or other official such sum as may be in their discretion a proper compensation for the work of computing taxes, making out the tax book and copies thereof, and the making of such reports as may be required by the State Board of Assessment; but the compensation allowed for computing the taxes and making out the tax book is not to exceed ten cents (10c) for each name appearing on the tax book, which shall include the original and duplicate tax book

and also the receipts and stubs provided for in this subchapter. (1939, c. 310, s. 1104.)

§ 105-327. County board of equalization and review.— (1) Personnel.—The county board of equalization and review of each county shall be composed of the board of county commissioners. Nothing in this subchapter shall be construed as repealing any law creating a special board of equalization and review, or creating any board charged with the duty of equalization and review in any county.

(2) Compensation.—The members of the board of equalization and review shall be allowed the same per diem compensation and traveling expense, while actually engaged in the performance of their duties, as is ordinarily paid to the members of the board of county commissioners, such compensation to be paid by

the county.

(3) Oath.—Before entering upon their duties each member of the board of equalization and review shall take and subscribe to the following oath and file the same with the clerk of the board of county commissioners: "I do solemnly swear (or affirm) that I will faithfully discharge my duties as a member of the Board of Equalization and Review of County, North Carolina; and that I will not allow my actions as a member of said board to be influenced by personal or political friendships or obligations.

(Signature.)

(4) Clerk.—The supervisor shall act as clerk to said board, shall be present at all meetings and give to the board such information as he may have or can obtain with respect to the valuation of taxable property in the county.

(5) Time of Meeting.—Said board shall hold its first meeting on the eleventh Monday following the day on which tax listing began, and may adjourn from time to time as its duties may require; but it shall complete its duties not later than the

third Monday following its first meeting.

(6) Notice of Meeting.—Notice of the time, place and purpose of the first meeting of said board shall be given by publishing said notice at least three times in some newspaper published in the county, the first publication to be at least ten

days prior to said meeting.

(7) Powers and Duties.—(a) It shall be the duty of the board of equalization and review to equalize the valuation of all property in the county, to the end that such property shall be listed on the tax records at the valuation required by law; and said board shall correct the tax records for each township so that they will conform to the provisions of this subchapter.

(b) The board shall, on request, hear any and all taxpayers who own or control taxable property assessed for taxation in the county in respect to the valua-

tion of such property or the property of others.

- (c) The board shall examine and review the tax lists of each township for the current year; shall, of its own motion or on sufficient cause shown by any person, list and assess any real or personal property or polls subject to taxation in the county omitted from said lists; shall correct all errors in the names of persons, in the description of property, and in the assessment and valuation of any taxable property appearing on said lists; shall increase or reduce the assessed value of any property which in their opinion shall have been returned below or above the valuation required by law; and shall cause to be done whatever else shall be necessary to make said lists comply with the provisions of this subchapter: Provided, that said board shall not change the valuation of any real property from the value at which it was assessed for the preceding year except in accordance with the terms of §§ 105-278, and 105-279.
- (d) The board may appoint committees, composed of its own members or other persons, to assist it in making any investigations necessary in its work. It may also employ expert appraisers in its discretion. The expense of the employment

of committees or appraisers shall be borne by the county: Provided, that the board may, in its discretion, require the taxpayer to pay the cost of any appraisal by experts demanded by him when said appraisal does not result in material reduction of the valuation of the property appraised and where such valuation is not subsequently reduced materially by the board or by the State Board of Assess-

(e) The board may subpoena witnesses, or books, records, papers and documents reasonably considered to be pertinent to the decision of any matter pending before it; and any member of the board may administer oaths to witnesses in connection with the taking of testimony. The chairman of the board shall sign the subpoena, and such subpoena shall be served by any officer qualified to serve subpoenas. (1939, c. 310, s. 1105.)

Local Modification. - McDowell: 1949, c. 550; Mecklenburg: 1941, c. 209; Wayne:

1941, c. 69.

Editor's Note .- It should be borne in mind that the cases cited below were de-

cided under former tax statutes.

Purpose of Notice.—The notice required before the meeting is general, and has reference to a general revision of the lists of the whole county, with a view to an equal and uniform assessment among the several townships, and it is to give opportunity to all who may be dissatisfied with the valuation of their property to make complaint and have it corrected. Commissioners v. Atlanta, etc., Ry. Co., 86 N. C. 541 (1882).

Valuation by Owner Subject to Review by Board.—The valuation upon personal property is made by the taxpayer when he lists his property, and is binding upon the list taker, but it may be corrected by the board of equalization at the dates fixed by the statute, upon due notice to the taxpayer. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 90 S. E. 202 (1916).

Revision without Notice Void. - Where the value of the solvent credits of a taxpayer are increased without due notice to him or his agent, such increase in value is a nullity. Wolfenden v. Commissioners, 152

N. C. 83, 67 S. E. 319 (1910).

Designated Date of Meeting Exclusive of Others.—See Wolfenden v. Commissioners, 152 N. C. 83, 67 S. E. 319 (1910). Before Whom Complaint Made. - The

complaint against excessive valuation must be made before the board of county commissioners, and the aldermen of the city have no jurisdiction to change such valuation. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 90 S. E. 202 (1916).

Requisites of Complaint.—The complaint in an action against a city to recover for taxes paid must allege that the valuation complained of is greater than that fixed by the county board of equalization, or the tax he was forced to pay was greater than it would have been if correctly computed at the legal rate on the valuation properly ascertained, or a demurrer thereto will be sustained. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 90 S. E. 202 (1916).

Appeal. — The county commissioners have exclusive original jurisdiction to grant relief against excessive valuation of property for taxation, and unless they proceed upon some erroneous principle, there is no appeal where the statute gives none. Wade v. Commissioners, 74 N. C. 81 (1876). As to appeal to State Board of Assessment, see § 105-329 and note.

When Duties and Powers Cease.—After the board of county commissioners has completed the revision of the tax lists as authorized by the statute its duties and powers as a revising board cease and determine until the time appointed by the statute for the next succeeding year. Wolfenden v. Commissioners, 152 N. C. 83, 67 S. E. 319 (1910).

§ 105-328. Giving effect to the decisions of the board .- All changes in names, descriptions or valuations made by the board of equalization shall be reflected upon the tax records by correction, rebate or additional charge; and when all such changes have been given effect, and the scroll or tax book has been totaled, the members of the board of equalization, or a majority thereof, shall sign a statement at the end of the scroll or tax book to the effect that the scroll is the fixed and permanent tax list and assessment roll for the current year, subject to the provisions of this subchapter. The omission of such endorsement shall not affect the validity of said scroll or tax book, or of any taxes levied on the basis of the valuations appearing in it. (1939, c. 310, s. 1106.)

§ 105-329. Appeals from the board of equalization and review to

the State Board of Assessment.—Any property owner, taxpayer, or member of the board of county commissioners may except to the order of the board of equalization and review and appeal therefrom to the State Board of Assessment by filing a written notice of such appeal with the clerk of the board of county commissioners within sixty days after the adjournment of the board of equalization and review. At the time of filing such notice of appeal the appellant shall file with the clerk to the board of county commissioners a statement in writing of the grounds of appeal, and shall, within ten days after filing such notice of appeal with the clerk to the board of county commissioners, file with the State Board of Assessment a notice of such appeal and attach thereto a copy of the statement of the grounds of appeal filed with the clerk to the board of county commissioners. Each taxpayer or ownership interest shall file separate and distinct appeals; no joint appeals shall be considered except by and with consent of the State Board of Assessment.

The State Board of Assessment shall fix a time for the hearing of such appeal, and shall hear the same in the city of Raleigh, or such other place within the State as the said Board may designate; shall give notice of time and place of such hearing to the appellant, appellee, and to the clerk to the board of county commissioners at least ten days prior to the said hearing; shall hear all the evidence or affidavits offered by the appellant, appellee, and the board of county commissioners, shall reduce, increase, or confirm the valuation fixed by the board of equalization and review and enter it accordingly, and shall deliver to the clerk of the board of county commissioners a certified copy of such order, which valuation shall be entered upon the fixed and permanent tax records and shall constitute the valuation for taxation. (1939, c. 310, s. 1107.)

Valuation Final and Conclusive.—This section contemplates that valuation fixed by the State Board shall be final and conclusive where no error of law or abuse of

discretion is alleged. Belk's Department Store v. Guilford County, 222 N. C. 441, 23 S. E. (2d) 897 (1943), citing Wade v. Commissioners, 74 N. C. 81 (1876).

§ 105-330. Powers of the commissioners with respect to the records after adjournment of the board of equalization.—After the board of equalization has finished its work and the changes effected by it have been given effect on the tax records, the board of county commissioners may not authorize any changes to be made on said records except as follows:

(1) To give effect to the decision of the State Board of Assessment on appeal.

(2) To add to the records any valuation certified by the State Board of Assessment with respect to property assessed in the first instance by said State Board, or to give effect to any valid corrections made in such assessments by the State Board.

(3) To correct the name of any taxpayer appearing on said records erroneously, or to substitute the name of the person who should have listed property for the name appearing on the records as listing said property, or to correct descriptions on said records, and any such corrections or substitutions shall have the same force and effect as if the name of the taxpayer or the description had been correctly listed in the first instance.

(4) To correct valuations or taxes appearing erroneously on the records as the result of clerical errors.

(5) To add any discovered property under the provisions of this subchapter.

(6) To reassess property when the supervisor reports that, since the completion of the work of the board of equalization, facts have come to his attention which render it advisable to raise or lower the assessment of some particular property of a given taxpayer: Provided, that no such reassessment shall be made unless it could have been made by the board of equalization had the same facts been brought to the attention of said board of equalization: Provided further, that this shall not authorize reassessment because of events or circumstances not taking place or arising until after the tax listing day.

(7) The board of county commissioners may give the supervisor general au-

thority to make any changes under this section except those under subsection (six); but neither the board nor the supervisor shall make any changes under subsection (three) or (six) which adversely affect the interests of any taxpayer without giving such taxpayer written notice and an opportunity to be heard prior to final determination. (1939, c. 310, s. 1108.)

§ 105-331. Discovery and assessment of property not listed during the regular listing period. — (1) Duty of Commissioners, Supervisors and List Takers: Carrying Forward Real Estate.—It shall be the duty of the members of the board of commissioners, the supervisor and the list takers to be constantly looking out for property and polls which have not been listed for taxation. After any tax list or abstract has been delivered to a list taker, the supervisor or the board of county commissioners, and such list taker, supervisor or board of county commissioners shall have reason to believe or sufficient evidence upon which to form a belief that the person, firm or corporation making such list or abstract, in person or by agent, has other personal property, tangible or intangible, money, solvent credits, or other thing liable for taxation, they or either of them shall take such action as may be needful to get such property on the tax list.

Either the list takers for the respective townships, the clerical assistants to the supervisor or the supervisor, as the supervisor may designate, shall examine the tax lists for the current year and the tax records for the preceding year, and carry forward all real property which was listed for the preceding year which has not been listed for the current year. In the discretion of the supervisor, such property may be listed on an abstract signed by the official or employee carrying it forward in the name of the taxpayer, or may be entered directly on the tax scroll or tax book by such official or employee. When such property is so listed in the name of the owner or in the name of the person last listing the same, the listing shall be as valid in every respect as if made by the owner; provided, that such listing shall not render any person individually liable to pay the taxes who is not under a duty to list such property.

(2) Procedure upon Discovery.—When property or polls are discovered they shall be listed in the name of the taxpayer by the supervisor or some person designated by him. The clerk to the board of commissioners or the supervisor shall mail a notice to the taxpayer at his last known address (or, if unknown, to the occupant or person in possession of such property) to the effect that the board of equalization at a designated meeting (or the county commissioners at their next regular meeting, in case the discovery is not made in time for consideration by the board of equalization) will assess the value of said property or approve the listing of said poll. At such meeting the board shall hear any objections presented by said taxpayer, render its decision and, if necessary under said decision, assess said property, subject to appeal to the State Board of Assessment, or approve the listing of said poll. Said property and polls may then be added to the regular tax records or placed in a separate record designated "Late Listings," which shall have the same force and effect as the regular records: Provided, nothing herein shall prevent valuation of such property or listing of such polls by agreement between the supervisor and taxpayer without action by the board of equalization or board of commissioners: Provided, further, nothing herein shall prevent the carrying forward of real estate, listed for the prior year in accordance with the terms of this subchapter, without notice to the owner or last person listing said realty unless, in years other than revaluation years, the valuation of such property is raised.

All property and polls not listed during the regular listing period shall, when eventually listed under this section or by the person carrying forward real estate, immediately be subject to the taxes for the various years for which listed or assessed, together with the penalties hereinafter set forth.

(3) Assessment for Previous Years; Penalties.—The county commissioners

may assess any such property or list such poll for the preceding years during

which it escaped taxation, not exceeding five, in addition to the current year. When real property is discovered which should have been listed for the current year, it shall be presumed that it should have been listed by the same taxpayer for the preceding five years unless the taxpayer shall produce satisfactory evidence that such property was actually listed for taxes during those years or some of them; provided, that this presumption shall not apply when real property is carried forward from the preceding year's records.

When personal property is discovered which should have been listed for the current year, it shall be presumed that such property should have been listed by the same taxpayer for the preceding five years, unless the taxpayer shall produce satisfactory evidence that such property was not in existence, that it was actually listed for taxation or that it was not his duty to list the same during said years or some of them. Where it is shown that such property should have been listed by some other taxpayer during a part or all of such preceding years, it may be assessed against such other taxpayer for the proper years, with the penalties as hereinafter prescribed.

In a proper case, property may be listed for one or more prior years during which it escaped taxation, even though it has been regularly listed for the current years, is no longer in existence or is no longer subject to taxation in this State.

The penalty for failure to list property or a poll before the close of the regular listing period shall be ten per cent (10%) of the tax levied for the current year on such property or poll. Where such property or poll is taxed for years preceding the current year, the penalty, in addition to that for the current year, shall be ten per cent (10%) per annum. The minimum penalty shall be one dollar (\$1.00). Taxes assessed for years preceding the current year shall be assessed at the rate of tax prevailing in the various preceding years.

The taxes and penalties for each year shall be shown separately on the records. but for the purpose of tax collection and foreclosure the total of all such taxes and penalties shall be regarded as taxes for the current year; and the schedule of discounts and penalties for payment or nonpayment of current taxes shall apply to such taxes and penalties for failure to list, despite the fact that such taxes and penalties for failure to list may not have been levied until the penalties for failure to pay have already accrued.

(4) Commissioners' Power to Compromise.—The board of county commissioners or the governing body of any municipal corporation is hereby authorized and empowered to settle or adjust all claims for taxation arising under this section or any other section authorizing them to place on the tax list any property omitted therefrom.

(5) Application to Cities and Towns.—The provisions of this section shall extend to all cities, towns and other municipal corporations having power to tax property or polls, and the power conferred and the duties imposed upon the board of county commissioners shall be exercised and performed by the governing body of the municipal corporation.

(6) Power to Employ Searchers.—The county commissioners, either separately or in conjunction with one or more municipal corporations in the county, may employ one or more competent men to make a diligent search and to discover and report to the board or the supervisor any unlisted property within the county, to the end that the same may be listed and assessed for taxation as provided in this section: Provided, nothing herein shall be construed as allowing a board of commissioners to appoint a tax collector unless it is otherwise authorized to do so

(7) Tax Receipts.—Tax receipts for the taxes and penalties assessed against the property discovered shall be made up under the provisions of this subchapter, shall be delivered to the sheriff or tax collector, who shall be charged with the same, and shall have the same force and effect and shall be a lien on the property in the same manner as if they had been delivered to the sheriff or tax collector at

the time of the delivery of the regular tax bills for the current year.

(8) Appeals.—Appeals may be had from the assessment fixed by the board of equalization or commissioners to the State Board of Assessment. Notice of said appeal must be served upon the clerk to the board of commissioners within sixty days after the assessment is fixed, and said appeal shall be in conformity with the provisions of this subchapter respecting appeals from boards of equalization. Each taxpaver or ownership interest shall file separate and distinct appeals; no joint appeals shall be considered except by and with consent of the State Board of Assess-

(9) Classified Property.—Any property, discovered and listed under the provisions of this section, entitled to classification under the provisions of this subchapter, shall be classified and assessed in accordance with said provisions. (1939,

c. 310. s. 1109.)

Local Modification.—Guilford: 1945, c.

Editor's Note. - The cases cited in the following note construe the somewhat similar provisions of the former statute.

Construed as Whole. - In Madison County v. Coxe, 204 N. C. 58, 167 S. E. 486 (1933), it was held that Public Laws 1927, c. 71, § 73, relating to the same subject matter as this section, must be construed as a whole, not piecemeal.

Discovery and Listing of Omitted Property.—The statute provides for discovery of taxable property not listed, by certain tax authorities, and listing same. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N.

C. 69, 185 S. E. 449 (1936).

Where the plaintiff guardian paid taxes on property of his ward, and thereafter, in accordance with a ruling that the property was nontaxable, obtained a refund of the tax and did not list the property again, and the property of the ward was not exempt from taxation, it was held that the prior ruling of the county commissioners to the effect that the property was nontaxable does not prevent them from listing the property for taxation for the prior five years, including the year for which the tax was refunded, Lawrence v. Shaw, 210 N. C. 352, 186 S. E. 504 (1936).

Compromise Settlement Is Binding Unless Made in Bad Faith .-- In the absence of a finding that the board of commissioners acted in bad faith in making a compromise settlement of a tax, or abused its discretion in so doing, mandamus to compel the commissioners to list and assess will be denied. Stone v. Board of Com'rs, 210 N. C. 226, 186 S. E. 342 (1936).

Rebuttal of Presumption.—The presumption created by statute, that the person in possession of personal property was the owner and in possession of said property on the taxing dates of the five preceding years, was held rebutted by the facts of the case. Coltrane v. Donnell. 203 N. C. 515. 166 S. E. 397 (1932).

Applied in Smith v. Dunn, 160 N. C. 174,

76 S. E. 242 (1912).

Cited in Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 90 S. E. 202 (1916).

ARTICLE 22.

Assessment Procedure of Cities and Towns.

§ 105-332. Status of property and polls listed for taxation. — All property and polls validly listed for taxation in any county, municipal corporation or taxing district shall be thereby also validly listed for taxation by any county, municipal corporation or taxing district in which it has a taxable situs. Said situs shall be determined by the rules prescribed in this subchapter. (1939, c. 310, s. 1200.)

§ 105-333. Tax lists and assessment powers of cities and towns. -All cities and towns may obtain their tax lists from the county records without securing lists signed by the taxpayers, or may set up their own machinery for securing lists from the taxpayers, in the discretion of the governing body.

All cities and towns not situated in more than one county shall accept the valuations fixed by the county authorities, as modified by the State Board of Assessment, under the provisions of this subchapter: Provided, that nothing in this section shall be construed to modify the authority given to cities and towns under this subchapter with respect to discovered property.

With the exception of the provisions relating to dog taxes, the provisions of §§

105-323 to 105-326 shall apply to cities and towns; and city and town governing bodies shall have the same powers conferred and the duties imposed by said sections upon the board of county commissioners, and wherever counties are referred to in said sections it shall be construed to include also cities and towns. (1939, c. 310, s. 1201.)

- § 105-334. Cities and towns situated in more than one county.— For the purpose of municipal taxation, all real and personal property and polls subject to taxation by cities and towns situated in two or more counties shall be listed and assessed as hereinafter set forth.
- (1) The governing body of each such city or town shall, in quadrennial years, on or before the date fixed for the appointment of the county supervisor, appoint a city supervisor of taxation, and two or more persons to act as list takers and assessors, each of whom, including the supervisor, shall have been resident free-holders in such city or town for a period of not less than twelve months. In years other than quadrennial years such governing body shall, on or before the date fixed for appointment of the county supervisor, appoint one resident freeholder as city supervisor of taxation and, in its discretion, one or more persons to act as list takers and assessors, each of whom shall have been a resident of such city or town for at least twelve months.
- (2) With respect to property to be listed for taxation in the city or town the city supervisor shall have the same powers and duties given to the county supervisor under the terms of this subchapter; and the city list takers and assessors shall have the same powers and duties given to county list takers and assessors under the terms of this subchapter; and the procedure of listing and assessing shall be, as nearly as possible, the same as that specified for county listing and assessing under the terms of this subchapter.

(3) The governing body of each such city or town may designate some officer or employee of the city or appoint some other person to supervise the preparation of the tax records and receipts, and to make such reports as the State Board of Assessment may request or require, and may employ such clerical assistance in this connection as it may deem advisable.

Such governing body shall also be vested with the same powers and duties, with respect to the listing of property for city taxation, as are vested by this subchapter in the county commissioners with respect to the listing of property for county taxation, and shall, with the city supervisor as chairman, sit as a board of equalization and review; and appeals may be taken from said city board of equalization to the State Board of Assessment in the same manner as provided in this subchapter for appeals from the county boards of equalization.

- (4) The intent and purpose of this section is to provide such cities and towns as lie in two or more counties only with the machinery necessary for listing and assessing taxes for municipal purposes. The powers to be exercised by and the duties imposed on such boards of aldermen, boards of commissioners or other governing bodies, boards of equalization and review, city supervisor of taxation, list takers and assessors, city clerk and taxpayers shall be the same, and they shall be subjected to the same penalties as provided in this subchapter for all boards of county commissioners, county auditors, registers of deeds, clerks of boards of county commissioners, county supervisors, list takers and assessors. The county commissioners in their discretion may adopt the tax lists, scroll, or assessment roll of such cities or towns, and when so adopted, shall be considered to all intent and purpose the correct and valid list and the fixed and determined assessment roll for the purpose of county taxation.
- (5) All expenses incident to the listing and assessing of the property for the purpose of municipal taxation as aforesaid shall be borne by the city or town for whose benefit the same is undertaken; provided, that where the county or counties in which such city or town lies shall adopt the list and the fixed, determined

assessment of the city board of equalization and review, the county board of commissioners may reimburse the governing body in such amounts as in their discretion may be proper. (1939, c. 310, s. 1202.)

ARTICLE 23.

Reports to the State Board of Assessment and Local Government Commission.

- § 105-335. Report of valuation and taxes.—The clerk of the board of county commissioners, auditor, tax supervisor, tax clerk, county accountant or other officer performing such duties shall, at such time as the board may prescribe. return to the State Board of Assessment on forms prescribed by said Board an abstract of the real and personal property of the county by townships, showing the number of acres of land and their value, the number of town lots and their value, the value of the several classes of livestock, the number of white and negro polls, separately, and specify every other subject of taxation and the amount of county tax payable on each subject and the amount payable on the whole. At the same time said clerk, auditor, supervisor or other officer shall return to the State Board of Assessment an abstract or list of the poll, county and school taxes payable in the county, setting forth separately the tax levied on each poll and on each hundred dollars' value of real and personal property for each purpose, and also the gross amount of every kind levied for county purposes, and such other and further information as the State Board of Assessment may require. (1939, c. 310, s. 1300.)
- § 105-336. Clerks of cities and towns to furnish information.—The clerk or auditor of each city and town in this State shall annually make and transmit to the State Board of Assessment, on blanks furnished by said Board, a full, correct, and accurate statement showing the assessed valuation of all property, tangible and intangible, within his city or town, and separately the amount of all taxes levied therein by said city or town, including school district, highway, street, sidewalk, and other similar improvement taxes for the current year, and the purposes for which the same were levied; and shall annually furnish to the local government commission a complete and detailed statement of the bonded and other indebtedness of the city or town, the accrued interest on the same, whether not due or due and unpaid, and the purposes for which said indebtedness was incurred. (1939, c. 310, s. 1301.)
- § 105-337. County indebtedness to be reported.—The auditor or county accountant of each county in this State shall make and deliver annually to the local government commission a full, correct and accurate statement of the bonded and other indebtedness of his county, including township, school districts, and special tax districts, the purposes for which the same was incurred, and all accrued interest, whether not due or due and unpaid. (1939, c. 310, s. 1302.)
- § 105-338. Penalty for failure to make report. Every register of deeds, auditor, county accountant, supervisor of taxation, assessor, sheriff, clerk of superior court, clerk of board of county commissioners, county commissioners, board of aldermen or other governing body of a city or town, mayor, clerk of city or town, or any other public officer, who shall willfully fail, refuse, or neglect to perform any duty required, to furnish any report to the State Board of Assessment or local government commission as prescribed in this subchapter or the Revenue Act, or who shall willfully and unlawfully hinder, delay or obstruct said Board in the discharge of its duties, shall, for every such failure, neglect, refusal, hindrance or delay, in addition to the other penalties imposed in this subchapter and the Revenue Act, pay to the State Board of Assessment or local government commission for the general fund of the State the sum of one hundred dollars (\$100.00), such sum to be collected by said Board or local government commission. A delay of thirty days to make and furnish any report required or to per-

form a duty imposed shall be prima facie evidence that such delay was willful. (1939, c. 310, s. 1303.)

ARTICLE 24.

Levy of Taxes and Penalties for Failure to Pay Taxes.

§ 105-339. Levy of taxes. — The tax levying authorities of the several counties, cities, towns and special districts shall, not later than Wednesday after the third Monday in August, levy such rate of tax for the general county purposes as may be necessary to meet the general expense of the county, not exceeding the legal limitation, and such rates for other purposes as may be authorized by law. (1939, c. 310, s. 1400.)

§ 105-340. Date as of which lien attaches.—The lien of taxes levied on property and polls listed pursuant to this subchapter shall attach to real estate as of the day as of which property is listed, regardless of the time at which liability for the tax may arise or the exact amount thereof be determined.

All penalties, interest and costs allowed by law shall automatically be added to the amount of such lien and shall be regarded as attaching at the same time as the lien for the principal amount of the taxes. Said lien shall attach to all real prop-

erty of the taxpayer in the taxing unit.

Taxes, interest, penalties and cost shall be a lien on personal property from and after levy on or attachment and garnishment of such property. (1939, c. 310, s. 1401.)

Cross Reference. — As to lien of assessment for local improvements after confir-

mation thereof, see § 160-88.

Editor's Note.—A modification of the law to meet an unacceptable interpretation of the former statute is found in this section which fixes a lien as of the date the property is listed. Under the old law no lien attached until July first and a transfer between April first and July first seemed to shed the burden of taxes entirely under the

decision of the court in State v. Champion Fibre Co., 204 N. C. 295, 168 S. E. 207 (1933). No reason appears why a lien cannot be effective to cover obligations yet to be ascertained and it is believed the new section cures a glaring defect in our tax law. 15 N. C. Law Rev. 391.

Cited in Bemis Hardwood Lbr. Co. v. Graham County, 214 N. C. 167, 198 S. E.

843 (1938).

§ 105-341. Levy of poll tax.—(1) There shall be levied by the board of county commissioners in each county a tax of two dollars (\$2.00) on each taxable poll or male person between the ages of twenty-one and fifty years, and the taxes levied and collected under this section shall be for the benefit of the public school

fund and the poor of the county.

(2) The board of county commissioners of every county shall have the power to exempt any person from the payment of poll taxes on account of indigency, and when any such person has been once exempted he shall not be required to renew his application unless the commissioners shall revoke the exemption. When such exemption shall have been made, the clerk of the board of county commissioners shall furnish the person with a certificate of such exemption, and the person to whom it is issued shall be required to list his poll, but upon exhibition of such certificate the list taker shall annually enter in the column intended for the poll the word "exempt," and the poll shall not be charged in computing the list.

(3) Cities and towns may levy a poll tax not exceeding that authorized by the Constitution, and poll taxes so levied and collected may be used for any purpose

permitted by law.

(4) While the existing state of war between the United States and any foreign nation continues and for the next tax listing period thereafter, members of the armed forces of the United States and members of the United States merchant marine shall be exempt from all poll taxes and no county or city shall levy any poll tax on such persons, and poll tax which such person was required to list prior to induction into the armed forces of the United States or joining the merchant ma-

rine which has not been paid, shall be canceled and such person relieved of such liability to pay the same. (1939, c. 310, s. 1402; 1943, c. 3.)

As to comment on section, see 12 N. C. Editor's Note - The 1943 amendment Law Rev. 23.

added subsection (4).

- § 105-342. What veterans exempt from poll tax; World War veterans .- Any honorably discharged veteran of any of the wars of the United States, now a resident of, and subject to capitation or poll tax in this State, and who received injuries in the line of duty in the military service, whether compensable or not, and all such honorably discharged veterans that have been, or are now, receiving compensation from the federal government for disability of service connected origin, shall be conclusively considered and presumed as having physical infirmities sufficient to warrant exemption from the payment of the capitation or poll tax under article five, section one, of the Constitution of North Carolina: Provided, however, that with respect to veterans of the World War, this section and § 105-343 shall apply only to those who served not less than ninety days during the period between April sixth, one thousand nine hundred seventeen, and November eleventh, one thousand nine hundred eighteen, or to those of such veterans who served with the United States forces in Russia during the period between April sixth, one thousand nine hundred seventeen, and April first, one thousand nine hundred twenty. (1931, c. 193, s. 1.)
- § 105-343. Proof of service and injury must be furnished; exemption by county commissioners.—The veteran or soldier claiming exemption under § 105-342 shall furnish proof of such service and injury by producing to the board of commissioners of his county his or her discharge or release or certificate of such service or injury, signed by a recognized official of the United States War Department or the Adjutant General's office of this State, and said discharge, release or certificate shall be recorded with the register of deeds of such county prior to tax listing date in the year in which exemption is claimed under §§ 105-342 and 105-343. It shall be the duty of the register of deeds at or before tax listing time in each county, to notify the board of county commissioners of the registration with him of such discharge, release or certificate and thereupon, upon application of the veteran, said board of county commissioners may take the action authorized by §§ 105-342 and 105-343. (1931, c. 193, s. 2.)
- § 105-344. Exemption of pensions or compensations from taxation. -Every person receiving a pension or compensation from the State, or United States, or any foreign country or government, for and on account of wounds or physical disabilities contracted or sustained during the late war between the United States and Germany, and any of the allied countries co-operating with the United States, shall not be required to pay any tax of any kind upon such pension or compensation, but the same shall be exempted from any and all taxes. This section shall apply to all such taxes for the year one thousand nine hundred and twenty-three, and thereafter.

The benefits of this section are hereby extended to and include those coming within the provisions of said section serving at any time between December seventh, one thousand nine hundred and forty-one and the termination of World

War II. (1923, c. 259; C. S., s. 5168(aa); 1945, c. 968, s. 2.)

Editor's Note.—The 1945 amendment added the last sentence of this section.

§ 105-345. Penalties and discounts for nonpayment of taxes.—All taxes assessed or levied by any county, city, town, special district or other political subdivision of this State, in accordance with the provisions of this subchapter, shall be due and payable on the first Monday of October of the year in which they are so assessed or levied, and if actually paid in cash:

(1) On or before the first day of November next after due and payable, there shall be deducted a discount of one-half of one per cent $(\frac{1}{2})$ of $(\frac{1}{2})$.

(2) After the first day of November and on or before the first day of February next after due and payable, the tax shall be paid at par or face value.

(3) After the first day of February and on or before the first day of March next after due and payable, there shall be added to the tax interest at the rate of one per cent (1%).

(4) After the first day of March and on or before the first day of April next after due and payable, there shall be added to the tax interest at the rate of two

per cent (2%).

(5) On and after the second day of April the rate of interest shall be, in addition to said two per cent (2%), one-half of one per cent per month or fraction

thereof until paid from said day on the principal amount of such taxes.

(6) Should any taxpayer desire to make a prepayment of his taxes between July first and October first of any year, he may do so by making payment to the county or city accountant, city clerk, auditor or treasurer, as the governing body may determine, and shall be entitled to the following discounts: If paid on or before July first, a deduction of two per cent (2%); if paid during the month of July, a deduction of one and one-half per cent (1½%); if paid during the month of August, a deduction of one per cent (1%); if paid during the month of September, a deduction of one per cent (1%).

(7) Any member of the armed forces of the United States may be relieved of the payment of any charges in the form of interest or penalty on delinquent ad valorem taxes assessed against the property of said member by any county or municipality for any taxable year during service in the said armed forces; provided, this subsection shall not extend beyond the duration of World War II; and provided further that said member of armed services presents to proper tax collecting authorities a certificate of discharge from United States armed

services in proof of membership therein.

(8) However, subsections (1), (2) and (6) hereof shall not apply to taxes levied by Mecklenburg County, and should any taxpayer of Mecklenburg County make payment of his taxes in the months of August through November following the levy thereof, he shall be entitled to the following discounts: If paid before or during the month of August, a deduction of two per cent (2%); if paid during the month of September, a deduction of one and one-half per cent (1½%); if paid during the month of October, a deduction of one per cent (1%); if paid during the month of November, a deduction of one-half of one per cent (½ of 1%). Taxes levied by Mecklenburg County shall be payable at par during the months of December and January next after same shall have become due and payable. (1939, c. 310, s. 1403; 1943, c. 667; 1945, c. 247, s. 3; c. 1041; 1947, c. 888, s. 1; 1949, c. 999.)

Local Modification. — Beaufort: 1937, c. 65; Bladen, as to subsections (1), (6): 1945, c. 335; Camden: 1943, c. 705; Cumberland and city of Fayetteville: 1945, c. 108; Franklin (towns of Bunn, Louisburg and Youngsville): 1943, c. 293; Iredell: 1941, c. 332; Surry (and towns of Elkin and Mount Airy): 1943, c. 710, s. 1; Wayne, as to subsection (6): 1947, c. 163; city of Charlotte: 1949, c. 743; city of Greensboro: 1949, c. 746; city of Hendersonville, as to subsection (6): 1949, c. 114.

Editor's Note.—The 1943 amendment added at the end of subsection (6) the words "if paid during the month of September, a deduction of one per cent (1%)."

The first 1945 amendment struck out the latter part of subsection (5) as it formerly read. And the second 1945 amendment added subsection (7).

The 1947 amendment substituted the words "interest at the rate" for the words "a penalty" in subsections (3) and (4). It also substituted "rate of interest" for "penalty" in subsection (5).

The 1949 amendment added paragraph (8).

For comment on the 1947 amendment, see 25 N. C. Law Rev. 460.

Discrimination between Different Counties.—A statute which discriminates between the different counties of the State,

as to the times when the payment of taxes can be compelled, is not unconstitutional, since its provisions affect every one alike in the localities, to which they are applicable and contain no violation of the principle of equation of taxation. State v. Jones, 121 N. C. 616, 28 S. E. 347 (1897).

§ 105-345.1. Penalty deemed to be interest.—Wherever the words "penalty" or "penalties" are used in any statute to designate any charge imposed by law with respect to the late payment of county or municipal ad valorem taxes, the same shall be deemed to mean and be interest, but this shall not be construed to authorize the computation and imposition of any charge different from that which would be computed and imposed if this section had not been enacted, or if § 105-345 had not been amended by substituting the designation "interest" for the designation "penalty" in several instances therein. (1947, c. 888, s. 2.)

ARTICLE 25.

Banks, Banking Associations, Trust Companies and Building and Loan Associations.

- § 105-346. Banks, banking associations and trust companies.—The value of shares of stock of banks, banking associations, and trust companies shall be determined as follows:
- (1) Every bank, banking association, industrial bank, savings institution, trust company, or joint-stock land bank located in this State shall list its real estate and tangible personal property, except money on hand, in the county in which such real estate and tangible personal property is located for the purpose of county and municipal taxation, and shall, during the second calendar month following the month in which local tax listing begins each year, list with the State Board of Assessment, on forms provided by the said State Board, in the name of and for its shareholders, all the shares of its capital stock, whether held by residents or nonresidents, at its actual value on the day as of which property is assessed under this subchapter.
- (2) The actual value of such shares for the purpose of this section shall be ascertained by adding together the capital stock, surplus, and undivided profits, and deducting therefrom the assessed value of such real and tangible personal property which such banking institutions shall have listed for taxation in the county or counties of this State wherein such real and tangible personal property is located, together with an amount according to its proportion of tax value of any buildings and lands wholly or partially occupied by such banking associations, institutions or trust companies, owned and listed for taxation by a North Carolina corporation in which such banking associations or institutions own ninety-nine per cent (99%) of the capital stock.
- (3) In addition to the deductions allowed in item two of this section, there may be deducted from the items of surplus and undivided profits an amount not exceeding five per cent (5%) of the bills and notes receivable of such banking associations, institutions, or trust companies to cover bad or insolvent debts, investments in North Carolina State bonds, United States government bonds, joint-stock land bank bonds, and federal land bank bonds, at the actual cost of said bonds owned on and continuously for at least ninety days prior to the day as of which property is assessed in the current year. The value of such shares of capital stock of such banking associations, institutions, or trust companies shall be found by dividing the net amount ascertained above by the number of shares in the said banking associations, institutions or trust companies.

Any bank which had not actually begun business prior to the first day of January in any year may make the deductions provided for under this subsection acquired up to the last date authorized for making the report provided for in

subsection (1) hereof. This provision shall be applicable to any bank which be-

gan business after the first day of January, 1945.

(4) If the State Board of Assessment shall have reason to believe that the actual value of such shares of stock of such banking associations, institutions, or trust companies, as listed with it, is not the true value in money, then the said Board shall ascertain such true value by such an examination and investigation as seems proper, and increase or reduce the value as so listed to such an amount as it ascertains to be the true value for the purposes of this section.

(5) The value of the capital stock of all such banking associations, institutions, and trust companies as found by the State Board of Assessment, in the manner herein described, shall be certified to the county and municipality in which such bank or institution is located: Provided, that if any such banking association, institution, or trust company shall have one or more branches, the State Board of Assessment shall make an allocation of the value of the capital stock so found as between the parent and branch bank or banks or trust company in proportion to the deposits of the parent and branch bank, banks, or trust company, and certify the allocated values so found to the counties and municipalities in which the parent

and the branch bank, banks, or trust company are located.

- (6) The taxes assessed upon the shares of stock of any such banking associations, institutions, or trust companies shall be paid by the cashier, secretary, treasurer, or other officer or officers thereof, and in the same manner and at the same time as other taxes are required to be paid in such counties, and in default thereof such cashier, secretary, treasurer, or other accounting officer, as well as such banking association, institution, or trust company, shall be liable for such taxes, and in addition thereto for a sum equal to ten per cent (10%) thereof. Any taxes so paid upon any such shares may, with the interest thereon, be recovered from the owners thereof by the banking association, institution, or trust company or officers thereof paying them, or may be deducted from the dividends accruing on such shares. The taxation of such shares of capital stock shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of this State coming in competition with the business of such banking associations, institutions, or trust companies.
- (7) In case of the failure or refusal of any bank, banking association or trust company to make and deliver to the State Board of Assessment any statement or statements required by this subchapter, such bank, banking association or trust company shall forfeit and pay to the State of North Carolina the sum of one hundred dollars (\$100.00) for each additional day such report is delinquent beyond the last day of the month in which said report is required to be made, such penalty to be sued for and recovered in any proper form of action in the name of the State of North Carolina on the relation of the State Board of Assessment, and such penalty, when collected, shall be paid into the general fund of the State. (1939, c. 310, s. 1500; 1947, c. 72.)

Editor's Note.—The 1947 amendment added the second paragraph of subsection (3).

The cases cited below were decided under former tax statutes.

Where Capital Invested in State Bonds.—Bank stock is taxable at its full value after deducting the assessed value of the bank's real and personal property, though the capital of the bank be invested in North Carolina State bonds. Pullen v. Corporation Comm., 152 N. C. 548, 68 S. E. 155 (1910).

Listing Bank Stock. — This section changes the policy of the State as declared

in ch. 234, sec. 42, Laws of 1917, as to the listing shares of bank stock by the holders where they reside, and fixing the situs of the shares for the purpose of county schools and municipal taxation at the residence of the owner, by omitting entirely the requirements of the act of 1917 that the owner of the shares shall list them at the place of his residence, and by imposing this duty on the bank, requiring the cashier or other officer to pay the taxes, the intent of the statute being to require the bank to pay all taxes on the shares of its stock, and to relieve the owners from listing or paying them, except as he may be required to

reimburse the bank. Planters Bank, etc., Co. v. Lumberton, 179 N. C. 409, 102 S. E. 629 (1920).

Deduction of Indebtedness.—In the taxation of shares of stock in a national bank, under the Revenue Act of 1885, the owner of such shares had the right to deduct from the assessed value thereof the amount of his bona fide indebtedness, as in case of other investments of moneyed capital. Mc-Aden v. Board, 97 N. C. 355, 2 S. E. 670 (1887).

Fixing Amount of Capital Stock.-Notes due a corporation are to be considered in estimating the value of the capital stock, and not as a separate item for taxation. Caldwell Land, etc., Co. v. Smith, 151 N.

C. 70, 65 S. E. 641 (1909).

The imposition upon a corporation of a tax on its "capital stock" in addition to a requirement that it shall list for taxation and pay the taxes assessed on the shares of its stockholders, does not make "double taxation." Board v. Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423

The tax on shares of stock of a hank is payable by the bank under the provisions of this section, it being required that the cashier or other proper officer of the bank pay the tax. Rockingham v. Hood, 204 N. C. 618, 169 S. E. 191 (1933).

Effect of Failure to Follow Prescribed Procedure.-Where the method prescribed by this section for determining the value of bank stock for taxation has not been followed, a bank may restrain the board of commissioners of a county from listing its shares of stock for taxation, Virginia-Carolina Joint Stock Land Bank v. Board of County Com'rs, 207 N. C. 50, 175 S. E. 705 (1934).

§ 105-347. Building and loan associations.—(1) The secretary of each building and loan association organized and/or doing business in this State shall list with the local assessors all the tangible real and personal property owned on the day as of which property is assessed each year, which shall be assessed and

taxed as like property of individuals.

(2) All foreign building and loan associations doing business in this State shall list for taxation, during the second calendar month following the month in which local tax listing begins each year, with the State Board of Assessment, through their respective agents, its stock held by citizens of this State, with the name of the county, city, or town in which the owners of said stock reside. In listing said stock for taxation the withdrawal value as fixed by the bylaws of each such association shall be furnished to the said Board, and the stock shall be valued for taxation at such withdrawal value.

Any association or officer of such association doing business in the State who shall fail, refuse or neglect to so list shares owned by citizens of this State for taxation shall be barred from doing business in this State; any local officer or other person who shall collect dues, assessments, premiums, fines, or interest from any citizen of this State for any such association which has failed, neglected, or refused to so list for taxation the stock held by citizens of this State shall be guilty of a misdemeanor, and fined and/or imprisoned in the discretion of the court.

The value of the shares of stock so held by citizens of this State, as found by the State Board of Assessment, shall be certified to the register of deeds of the county in which such shareholders reside, shall be placed on the assessment roll in the name of such holders thereof, and taxed as other property is taxed. (1939, c. 310, s. 1501.)

Capital Stock as Property.-The capital stock of a building and loan association is property and hence is taxable according to the uniform ad valorem system established by the Constitution. Loan Ass'n v. Commissioners, 115 N. C. 410, 20 S. E. 526

The payment of a privilege tax under § 105-68 does not bar the ad valorem tax imposed on building and loan associations. Loan Ass'n v. Commissioners, 115 N. C. 410, 20 S. E. 526 (1894).

§ 105-348. Article not to conflict with §§ 105-198 to 105-217.— None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 1502.)

§ 105-349. State Board to keep record of all corporations, etc.; secrecy enjoined.—The State Board of Assessment shall prepare and keep a record book in which it shall enter a correct list of all the corporations, limited partnerships, joint-stock associations, banks, banking associations, industrial banks, savings institutions, and trust companies which it has assessed for taxation, and said record shall show the assessed valuation placed upon them; and the State Board of Assessment shall not divulge or make public any report of such corporation, partnership, or association required to be made to it, except as provided in this subchapter or the Revenue Act. (1939, c. 310, s. 1503).

ARTICLE 26.

Public Service Companies.

§ 105-350. Telegraph companies. — Every joint-stock association, company, copartnership or corporation, whether incorporated under the laws of this State or any other state or any foreign nation, engaged in transmitting to, from, through, in, or across the State of North Carolina telegraph messages shall be deemed and held to be a telegraph company; and every such telegraph company shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the State Board of Assessment a statement, verified by oath of the officer or agent of such company making such statement, with reference to the day as of which property is assessed next preceding, showing:

First. The total capital stock of such association, company, copartnership, or

corporation.

Second. The number of shares of capital stock issued and outstanding, and the par value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the State, and the location and assessed value thereof in each

county where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership, or corporation situated outside the State of North Carolina and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any part of its property, together

with the dates and amounts thereof.

Eighth. (a) The total length of lines of said association or company; (b) the total length of so much of their lines as is outside of the State of North Carolina; (c) the length of the lines and wire mileage within each of the counties, townships, and incorporated towns within the State of North Carolina.

Ninth. Such other and further information as the State Board of Assessment

may require. (1939, c. 310, s. 1600.)

Editor's Note.—See 12 N. C. Law Rev. 34.

§ 105-351. Telephone companies.—Every telephone company doing business in this State, whether incorporated under the laws of this State or any other state, or of any foreign nation, shall, during the second calendar month following the month in which local tax listing begins each year, make out and

deliver to the State Board of Assessment of this State a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the day as of which property is assessed next preceding, showing:

First. The total capital stock of such association, company, copartnership, or

corporation invested in the operation of such telephone business.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership, or corporation and subject to local taxation within the State, and the location and assessed value thereof in each

county where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership, or corporation, situated outside of the State of North Carolina, and not used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any of its property, together with

the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company; (b) the total length of so much of their lines as is outside of the State of North Carolina; (c) the length of the lines and wire mileage within each of the counties, townships, and incorporated towns within the State of North Carolina.

Ninth. Such other and further information as the State Board of Assessment

may require. (1939, c. 310, s. 1601.)

§ 105-352. Express companies.—Every joint-stock association, company, copartnership, or corporation, incorporated or acting under the laws of this State or any other state, or any foreign nation, engaged in carrying to, from, through, in or across this State, or any part thereof, money, packages, gold, silver, plate, merchandise, freight, or other articles, under any contract, expressed or implied, with any railroad company or the managers, lessees, agents or receivers thereof, provided such joint-stock association, company, copartnership or corporation is not a railroad company, shall be deemed and held to be an express company within the meaning of this subchapter; and every such express company shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the State Board of Assessment a statement, verified by the oath of the officer or agent of such association, company, copartnership or corporation making such statement, with reference to the day as of which property is assessed next preceding, showing:

First. The total capital stock or capital of said association, copartnership or

corporation.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share; and in case no shares of capital stock are issued, in what manner the capital stock thereof is divided, and in what manner such holdings are evidenced.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof; and in case no shares of stock have been issued, state the market value, or the actual value in case there is no market value, of the capital thereof, and the manner in which the same is divided.

Fifth. The real estate, structures, machinery, fixtures and appliances owned by the said association, company, copartnership or corporation, and subject to local taxation within the State of North Carolina, and the location and assessed value thereof in each county where the same is assessed for local taxation.

Sixth. The specific real estate, together with the improvements thereon, owned by the association, company, copartnership or corporation situated outside the State of North Carolina, and not used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any part of its property, tegether

with the dates and amounts thereof.

Eighth. (a) The total length of the lines or routes over which such association, company, copartnership or corporation transports such merchandise, freight, or express matter; (b) the total length of such lines or routes as are outside the State of North Carolina; (c) the length of such lines or routes within each of the counties, municipalities and townships within the State of North Carolina.

Ninth. Such other and further information as the State Board of Assess-

ment may require. (1939, c. 310, s. 1602.)

§ 105-353. Sleeping car companies. — Every joint-stock association, company, copartnership or corporation incorporated or acting under the laws of this or any other state, or of any foreign nation, and conveying to, from, through, in or across this State, or any part thereof, passengers or travelers in palace cars, drawingroom cars, sleeping cars, dining cars, or chair cars, under any contract, expressed or implied, with any railroad company or the managers, lessees, agents or receivers thereof, shall be deemed and held to be a sleeping car company for the purposes of this subchapter, and shall hereinafter be called "sleeping car company;" and every such sleeping car company doing business in this State shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the State Board of Assessment a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the day as of which property is assessed next preceding, showing:

First. The total capital stock of such sleeping car company invested in its sleep-

ing car business.

Second. The number of shares of such capital stock devoted to the sleeping car business issued and outstanding and the par or face value of each share.

Third. Under the laws of what state it is incorporated.

Fourth. Its principal place of business.

Fifth. The names and post-office addresses of its president and secretary.

Sixth. The actual cash value of the shares of such capital stock devoted to its sleeping car business on the day as of which property is assessed next preceding such report.

Seventh. The real estate, structures, machinery, fixtures, and appliances owned by said sleeping car company and subject to local taxation within this State, and the location and assessed value thereof in each county within this State where the same is assessed for local taxation.

Eighth. All mortgages upon the whole or any part of its property, and the amounts thereof, devoted to its sleeping car business.

Ninth. (a) The total length of the main line of railroad over which cars are run; (b) the total length of so much of the main lines of railroad over which the said cars are run outside of the State of North Carolina; (c) the length of the lines of railroads over which said cars are run within each of the counties within the State of North Carolina: Provided, that where the railroads over which said cars run have double tracks, or a greater number of tracks than

a single track, the statement shall only give the mileage as though such tracks were but single tracks; and in case it shall be required, such statement shall show in detail the number of miles of each or any particular railroad or system within the State. When the assessment shall have been made by the State Board of Assessment in accordance with § 105-358, the Board shall thereupon notify the officer attesting such report of the amount assessed against it, and such sleeping car company shall have twenty days within which to appear and make objection, if any it shall have, to said assessment. If no objection be made within twenty days, the State Board of Assessment shall certify to the county commissioners of the several counties through which such cars are used the value of the property of such sleeping car company within such county in the proportion that the number of miles of railroad over which such cars are used in said county bears to the number of miles of railroad over which such cars are used within the State, together with the name and post-office address of the officers attesting such report of such sleeping car company, with the information that tax bills when assessed, are to be sent to him by mail; and such value, so certified, shall be assessed and taxed the same as other property within said county. And when the assessment shall have been made in such county, the sheriff or county tax collector shall send to the address given by the State Board of Assessment to the county commissioners a bill for the total amount of all taxes due to such county. and such sleeping car company shall have sixty days thereafter within which to pay said taxes; and upon failure of and refusal to do so such taxes shall be collected the same as other delinquent taxes are, together with a penalty of fifty per cent (50%) added thereto, and costs of collection. (1939, c. 310, s. 1603.)

§ 105-354. Refrigerator and freight car companies.—Every person, firm, or corporation owning refrigerator or freight cars operated over or leased to any railroad company in this State or operated in the State shall be taxed in the same manner as hereinbefore provided for the taxing of sleeping car companies, and the collection of the tax thereon shall be followed in assessing and collecting the tax on the refrigerator and freight cars taxed under this section: Provided, if it appears that the owner does not lease the cars to any railroad company, or make any contract to furnish it with cars, but they are furnished to be run indiscriminately over any lines on which shipper or railroad companies may desire to send them, and the owner receives compensation from each road over which the car runs, the State Board of Assessment shall ascertain and assess the value of the average number of cars which are in use within the State as a part of the necessary equipment of any railroad company for the year ending with the day as of which property is assessed, next preceding the report, and the tax shall be computed upon this assessment. In making distribution of any taxable valuation by virtue of the provisions of this section, the State Board of Assessment shall give primary consideration to the county or counties in which the taxpayer has the greater car mileage. The operation of this section shall be suspended during the continuance of § 105-228.2, prescribing a method of taxing freight car line companies on the basis of their gross receipts from operation of their properties in this State. If for any reason such method of taxing freight car line companies prescribed in § 105-228.2 should be held to be invalid, the provisions of this section shall again become operative, as if it had not been suspended, and it shall be the duty of the State Board of Assessment to assess for ad valorem taxation all properties of freight line companies subject to tax under this section and all properties of such freight line companies not heretofore assessed under this section. (1939, c. 310, s. 1604; 1943, c. 634, s. 3.)

Editor's Note. — The 1943 amendment added the last two sentences.

§ 105-355. Street railway, waterworks, electric light and power,

gas, ferry, bridge, and other public utility companies.—Every street railway company, waterworks company, electric light and power company, gas company, ferry company, bridge company, canal company, and other corporations exercising the right of eminent domain, shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the State Board of Assessment a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the copartnership or corporation, showing:

First. The total capital stock of such association, company, copartnership, or

corporation.

Second. The number of shares of capital stock issued and outstanding and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the State, and the location and assessed value thereof in each county, municipality and township where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership, or corporation situate outside of the State of North Carolina and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situate.

Seventh. All mortgages upon the whole or any part of its property, together

with the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company; (b) the total length of so much of their lines as is outside of the State of North Carolina; (c) the length of lines within each of the counties, municipalities and townships within the State of North Carolina.

Ninth. Such other and further information as the State Board of Assessment

may require. (1939, c. 310, s. 1605.)

- § 105-356. State Board of Assessment may require additional information.—Upon the filing of the statements required in the preceding sections the State Board of Assessment shall examine the same and, if the Board shall deem the same insufficient, or in case it shall deem that other information is requisite, it shall require such officer to make such other and further statements as said Board may call for. In case of the failure or refusal of any bank, association, company, copartnership, or corporation to make out and deliver to the State Board of Assessment any statement or statements required by this subchapter, such bank, association, company, copartnership, or corporation shall forfeit and pay to the State of North Carolina one hundred dollars (\$100.00) for each additional day such report is delayed beyond the last day of the month in which required to be made, to be sued for and recovered in any proper form of action in the name of the State of North Carolina on the relation of the State Board of Assessment, and such penalty, when collected, shall be paid into the general fund of the State. (1939, c. 310, s. 1606.)
- § 105-357. State Board of Assessment shall examine statements.—The State Board of Assessment shall thereupon value and assess the property of each association, company, copartnership, or corporation in the manner hereinafter set forth, after examining such statements and after ascertaining the value of such properties therefrom and upon such other information as the Board may have or obtain. For that purpose it may require the agents or officers of said

association, company, copartnership, or corporation to appear before it with such books, papers, and statements as it may require, or may require additional statements to be made, and may compel the attendance of witnesses in case the Board shall deem it necessary to enable it to ascertain the true cash value of such property. (1939, c. 310, s. 1607.)

105-358. Manner of assessment. - Said State Board of Assessment shall first ascertain the true cash value of the entire property owned by the said association, company, copartnership, or corporation from said statement or otherwise for the purpose, taking the aggregate value of all the shares of capital stock, in case shares have a market value, and in case they have none, taking the actual value thereof or of the capital of said association, company, copartnership, or corporation in whatever manner the same is divided, in case no shares of capital stock have been issued: Provided, however, that in case the whole or any portion of the property of such association, company, copartnership, or corporation shall be encumbered by a mortgage or mortgages, such Board shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock, or to the value of the capital in case there should be no such shares, the aggregate amounts of such mortgage or mortgages, and the result shall be deemed and treated as the true cash value of the property of such association, company, copartnership, or corporation. Such State Board of Assessment shall, for the purpose of ascertaining the true cash value of property within the State of North Carolina, next ascertain from such statements or otherwise the assessed value for taxation, in the localities where the same is situated, of the several pieces of real estate situated within and without the State of North Carolina and not in any manner used in the general business of such associations, companies, copartnerships or corporations, which assessed value for taxation shall be by said Board deducted from the gross value of the property as above ascertained. Said State Board of Assessment shall next ascertain and assess the true cash value of the property, including intangible personal property, of the associations, companies, copartnerships, or corporations within the State of North Carolina by taking as a guide, as far as practicable, the proportion of the whole aggregate value of said associations, companies, copartnerships as above ascertained, after deducting the assessed value of such real estate without the State which the length of lines of said associations, companies, copartnerships or corporations, in the case of telegraph and telephone companies, within the State of North Carolina bears to the total length thereof, and in the case of express companies and sleeping car companies the proportion shall be in proportion of the whole aggregate value after such deduction, which the length of lines or routes within the State of North Carolina bears to the whole length of lines or routes of such associations, companies, copartnerships or corporations, and such amounts so ascertained shall be deemed and held as the entire value of the property of said associations, companies, copartnerships or corporations within the State of North Carolina: Provided, the Board shall, in valuing the fixed property in this State, give due consideration to the amount of gross and net earnings per mile of line in this State, and any other factor which would give a greater or less value per mile in this State than the average value for the entire system. From the entire value of the property within the State so ascertained there shall be deducted by the State Board of Assessment the assessed value for taxation of all real estate, structures, machinery, and appliances within the State listed with the local taxing authorities of this State if used in the general business of the taxpayer and subject to local taxation in the counties, as hereinbefore described in §§ 105-352 to 105-357, inclusive, and the assessed value for taxation of all intangible personal property returned and assessed under the provisions of Schedule H, §§ 105-198 to 105-217, and the residue of such value as ascertained, after deducting therefrom the assessed value of such properties, shall be by said Board assessed to said associations: Provided, the State Board of Assessment shall also assess the value for taxation

of all structures, machinery, appliances, pole lines, wire and conduit of telephone and telegraph companies within the State subject to local taxation, but land and buildings located thereon owned by said companies shall be assessed in like manner and by the same officials as though such property was owned by individuals in this State. (1939, c. 310, s. 1608.)

- § 105-359. Value per mile.—Said State Board of Assessment shall thereupon ascertain the value per mile of the property within the State by dividing the total value as above ascertained, after deducting the specific properties locally assessed within the State, by the number of miles within the State, and the result shall be deemed and held as value per mile of the property of such association, company, copartnership, or corporation within the State of North Carolina: Provided, the value per mile of telephone and telegraph companies shall be determined on a wire mileage basis. (1939, c. 310, s. 1609.)
- § 105-360. Total value for each county and municipality.—Said Board of Assessment shall thereupon, for the purpose of determining what amount shall be assessed by it to said association, company, copartnership, or corporation in each county in the State through, across, and into or over which the lines of said association, company, copartnership or corporation extend, multiply the value per mile, as above ascertained, by the number of miles in each of such counties as reported in said statements or as otherwise ascertained, and the result thereof shall be by the secretary of said State Board certified to the chairman of the board of county commissioners, respectively, of the several counties through, into, over, or across which the lines or routes of said association, company, copartnership, or corporation extend: Provided, the total value of street railways, electric light, power and gas companies, as determined in § 105-358 to be certified to each county, shall be the proportion which the locally assessed value of the physical property in each county bears to the total assessed value of the physical property in the State. Distribution and certification by the State Board of Assessment to the municipalities and other local taxing jurisdictions shall follow the same general rules governing such distribution to the several counties of the State with respect to the value per mile and total value as herein set out. All taxes due the State from any corporation taxed under the preceding sections shall be paid by the treasurer of each company direct to the Commissioner of Revenue. (1939, c. 310, s. 1610.)
- 105-361. Companies failing to pay tax; penalty.—In case any such association, company, copartnership, or corporation as named in this subchapter shall fail or refuse to pay any taxes assessed against it in any county, municipality or other taxing jurisdiction in this State, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the State of North Carolina by the solicitors of the different judicial districts of the State on the relation of the board of commissioners of the different counties of this State and the judgment in said action shall include a penalty of 50% of the amount of taxes as assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any county into, through, over or across which the lines or routes of any association, company, copartnership, or corporation shall extend, or in any county where such association, company, copartnership, or corporation shall have an office or agent for the transaction of business. In case such association, company, copartnership, or corporation shall have refused to pay the whole of the taxes assessed against the same by the State Board of Assessment, or in case such association, company, copartnership, or corporation shall have refused to pay the taxes or any portion thereof assessed to it in any particular county or counties, such action may include the whole or any portion of the taxes so unpaid in any county or counties; but the Attorney General may, at his option, unite in one action the entire amount of the tax due, or may bring separate actions to each separate county or adjoining

counties, as he may prefer. All collection of taxes for or on account of any particular county made in any such suit or suits shall be by said Board accounted for as a credit to the respective counties for or on account of which such collections were made by the said Board at the next ensuing settlement with such county, but the penalty so collected shall be credited to the general fund of the State, and upon such settlement being made the treasurers of the several counties shall, at their next settlement, enter credits upon the proper duplicates in their offices, and at the next settlement with such county, report the amount so received by him in his settlement with the State, and proper entries shall be made with reference thereto: Provided, that in any such action the amount of the assessments fixed by said State Board of Assessment and apportioned to such county shall not be controverted. (1939, c. 310, s. 1611.)

§ 105-362. State Board of Assessment made appraisers for public utilities.—The State Board of Assessment herein established is constituted a board of appraisers and assessors for railroad, canal, steamboat, hydroelectric, street railway, and all other companies exercising the right of eminent domain. (1939, c. 310, s. 1612.)

Abandoned Portion of Railroad.—Where a railroad, under an order of the Interstate Commerce Commission, abandons its operations as a common carrier on a portion of its road, and thereafter does not operate over such portion of its line except to haul away the scrap as the roadbed is

dismantled and salvaged, such abandoned portion of the road ceases to be vested with a character which would bring it within the jurisdiction of the State Board of Assessment for appraisal and taxation. Warren v. Maxwell, 223 N. C. 604, 27 S. E. (2d) 721 (1943).

§ 105-363. Returns to State Board by railroad, etc., companies. -The president, secretary, superintendent or other principal accounting officer within this State of every railroad, telegraph, telephone, street railway company, whether incorporated by the laws of this State or not, shall, during the second calendar month following the month in which local tax listing begins each year, return to the State Board of Assessment, verified by the oath or affirmation of the officer making the return, all the following described property belonging to such corporation within the State, viz: The number of miles of such railroad lines in each county and municipality in this State, and the total number of miles in the State, including the roadbed, right-of-way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses and the land upon which they are situated and necessary to their use, water stations and land, coal chutes and land, and real estate and personal property of every character necessary for the construction and successful operation of such railroad, or used in the daily operation, whether situated on the charter right-of-way of the railroad or on additional land acquired for this purpose, except as provided below, including, also, if desired by the State Board of Assessment, Pullman or sleeping cars or refrigerator cars owned by them or operated over their lines: Provided. however, that all machines and repair shops, general office buildings, storehouses and contents thereof, located outside of the right-of-way shall be listed for purposes of taxation by the principal officers or agents of such companies with the list takers of the county where the real and personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property. A list of such property shall be filed by such company with the State Board of Assessment. It shall be the duty of the tax supervisor, county accountant and register of deeds, if requested so to do by the State Board of Assessment, to certify and send to the said Board a statement giving a description of the property mentioned in the foregoing proviso, and showing the assessed valuation thereof, which value shall be deducted from the total value of the property of such railroad company as arrived at by the Board in accordance with § 105-365, before the apportionment is made to the counties and municipalities. The tax supervisor, county accountant and register of deeds shall also certify to the Board the local rate of

taxation for county purposes as soon as the same shall be determined, and such other information obtained in the performance of the duties of their offices as the said Board shall require of them; and the mayor of each city or town shall cause to be sent to the said Board the local rate of taxation for municipal purposes. (1939, c. 310, s. 1613.)

Former Law. - As to construction of prior law providing for the assessment of railroad property by the former Corporation Commission, see Atlantic, etc., R. Co. v. New Bern, 147 N. C. 165, 60 S. E. 925

The word "superstructures" covers all buildings situated on the right of way. Atlantic, etc., R. Co. v. New Bern, 147 N. C. 165, 60 S. E. 925 (1908).

Province of Local Officers.—In assessing railroad property, local officers only list and

assess such property as is off the right of wav. Caldwell Land Co. v. Smith, 151 N. C. 70, 65 S. E. 641 (1909).

A road definitely abandoned and retired from the operative system, after a proper order respecting the convenience and necessity of its further operation as a carrying road has been granted for such abandonment, is no longer within the purview of this statute. Warren v. Maxwell, 223 N. C. 604, 27 S. E. (2d) 721 (1943).

§ 105-364. Railroads; annual schedule of rolling stock, etc., to be furnished to State Board.—The movable property belonging to a railroad company shall be denominated, for the purposes of taxation, "rolling stock." Every person, company, or corporation owning, constructing, or operating a railroad in this State shall, during the second calendar month following the month in which local tax listing begins each year, return a list or schedule to the State Board of Assessment which shall contain a correct detailed inventory of all the rolling stock belonging to such company, and which shall distinctly set forth the number of locomotives of all classes, passenger cars of all classes, sleeping cars and dining cars, express cars, horse cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars, handcars, and all other kinds of cars, and the value thereof, and a statement or schedule as follows:

(1) The amount of capital stock authorized and the number of shares into which such capital stock is divided; (2) the amount of capital stock paid up; (3) the market value, or, if no market value, then the actual value of shares of stock; (4) the length of line operated in each county and total in the State; (5) the total assessed value of all tangible property in the State. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the Board, and with reference to amounts and value on the day as of which property is assessed for the year for which the return is made. (1939, c. 310, s. 1614.)

used upon the branch roads, or roads otherwise acquired, ascertained by a pro rata standard based on the relative length there-

The rolling stock of a railroad company, of to the whole line is liable to taxation. Wilmington, etc., R. Co. v. Alsbrook, 110 N. C. 137, 14 S. E. 652 (1936), construing prior law.

§ 105-365. Railroads; tangible and intangible property assessed separately.—(a) At such dates as real estate is required to be assessed for taxation the said Board of Assessment shall first determine the value of the tangible property of each division or branch of such railroad or rolling stock and all the other physical or tangible property. This value shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as is in the case of private property.

(b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted) as evidenced by the market value of all capital stock, certificates of indebtedness, bonds, or any other securities, the value of which is based upon the earning capacity of

the property.

(c) The aggregate value of the physical or tangible property, and the franchise,

as thus determined, shall be the true value of the property for the purpose of ad valorem taxation, and shall be apportioned in the same proportion that the length of such road in such county bears to the entire length of each division or branch thereof, and the State Board of Assessment shall certify, on or before the first day of September, or as soon thereafter as practicable, to the chairman of the county commissioners and to the mayor of each city or incorporated town the amounts apportioned to his county, city or town. The board of county commissioners of each county through which said railroad passes shall assess against the same only the tax imposed for county, township, or other taxing district purposes, the same as is levied on other property in such county, township, or special taxing districts. (1939, c. 310, s. 1615.)

- 105-366. Railroads; valuation where road both within and without State.—When any railroad has part of its road in this State and part thereof in any other state, the said Board shall ascertain the value of railroad track, rolling stock, and all other property liable to assessment by the State Board of Assessment of such company as provided in § 105-365, and divide it in the proportion to the length such main line of road in this State bears to the whole length of such main line of road and determine the value in this State accordingly: Provided, the Board shall, in valuing the fixed property in this State, give due consideration to the character of roadbed and fixed equipment, number of miles of double track, the amount of gross and net earnings per mile of road in this State, and any other factor which would give a greater or less value per mile of road in this State than the average value for the entire system. On or after the first Monday in the month following the month in which said reports are required to be made, the said Board shall give a hearing to all the companies interested, touching the valuation and assessment of their property. The said Board may, if they see fit, require all argument and communications to be presented in writing. (1939, c. 310, s. 1616.)
- § 105-367. Railroads; in cases of leased roads.—If the property of any railroad company be leased or operated by any other corporation, foreign or domestic, the property of the lessor or company whose property is operated shall be subject to taxation in the manner hereinbefore directed; and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this State other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect to such property in like manner as any domestic railroad company. (1939, c. 310, s. 1617.)
- § 105-368. Railroads; Board may subpoena witnesses and compel production of records; penalty for failure to furnish required information.—The State Board of Assessment shall have power to summon and examine witnesses and require that books and papers shall be presented to them for the purpose of obtaining such information as may be necessary to aid in determining the valuation of any railroad company. Any president, secretary, receiver, or accounting officer, servant or agent of any railroad or steamboat company having any proportion of its property or roadway in this State who shall refuse to attend before the said Board when required to do so, or refuse to submit to the inspection of said Board any books or papers of such railroad company in his possession, custody, or control, or shall refuse to answer such questions as may be put to him by said Board, or order touching the business or property, monies and credits, and the value thereof, of said railroad company, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be confined in the jail of the county not exceeding thirty days, shall be fined in any sum not exceeding five hundred dollars (\$500.00) and costs, and any president, secretary, accounting officer, servant, or agent aforesaid so refusing as aforesaid shall be deemed guilty of contempt of such Board, and may be confined, by order of said Board, in the jail of the proper county until he shall comply with such order and pay the cost of his imprisonment. (1939, c. 310, s. 1618.)

- § 105-369. Taxes on railroads shall be a lien on property of the same.—The taxes upon any and all railroads in this State, including roadbed, right-of-way, depots, side tracks, ties, and rails, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereupon, commencing from the day as of which property is assessed in each current year, against all claims or demands whatsoever of all persons or bodies corporate except the United States and this State, and the above described property or any part thereof may be taken and held for payment of all taxes assessed against said railroad company in the several counties of this State. (1939, c. 310, s. 1619.)
- 8 105-370. Board of Assessment to certify apportionment of valuation to counties and municipalities; payment of local taxes.—The State Board of Assessment shall, upon completion of the assessment directed in the preceding sections, certify to the register of deeds or tax supervisor of the counties and the clerk of the board of commissioners of the municipalities through which said companies operate the apportionment of the valuations as hereinbefore determined and apportioned by the Board, and the board of county commissioners and taxing authorities of municipalities or other taxing jurisdictions respectively, shall assess against such valuation the same tax imposed for county, township, town, or other tax district purposes, as that levied on all other property in such county, township, town, or other taxing districts. This tax shall be paid to the sheriff or tax collector of the county and municipality. (1939, c. 310, s. 1620.)
- § 105-371. Canal and steamboat companies. The property of all canal and steamboat companies in this State shall be assessed for taxation as above provided for railroads. In case any officer fails to return the property provided in this section, the Board shall ascertain the length of such property in this State, and shall assess the same in proportion to the length at the highest rate at which property of that kind is assessed by them. (1939, c. 310, s. 1621.)

ARTICLE 27.

Collection and Foreclosure of Taxes.

§ 105-372. Definitions.—As used in this article, unless the context otherwise indicates:

(1) "Tax collector" or "collector" means sheriffs, tax collectors and all other officials charged with the duty of collecting taxes levied by or for counties, cities, school districts, road districts or other political subdivisions of this State.

(2) "Taxes" means property taxes (other than taxes levied under Schedule H, §§ 105-198 to 105-217), poll taxes and dog taxes levied by or for counties, cities, school districts, road districts or other political subdivisions of this State.

(3) "Taxing unit" means any county, city, school district, road district or other political subdivision of this State by or for which taxes are levied.

(4) "City" means any incorporated city or town.

(5) "District" means any taxing unit other than counties and cities.

(6) "Person" means any individual, firm, corporation, company, partnership, trust, estate, or fiduciary. (1939, c. 310, s. 1700.)

Local Modification. - Duplin: 1935, c.

189; 1939, c. 310, § 1725.

§ 105-373. Appointment, terms, qualifications and bond of city tax collectors.—The governing body of each city in this State shall appoint a tax collector, who shall be some person of character and integrity, with experience in business or in collection work, to collect taxes levied by the city governing body. The governing body may, in its discretion, designate some official or employee of the city who has other duties, to perform also the duties of tax collector. The governing body shall fix the compensation of said collector and, subject to the provisions of this article, shall prescribe the amount of his bond and approve the

sureties thereon. Any premiums on said bond shall be paid in such manner as the governing body may direct. No tax collector shall be allowed to begin his duties until he shall have furnished bond satisfactory to the governing body; nor shall any collector be permitted to continue collecting taxes after his bond has expired without renewal; nor shall any collector be allowed to collect any taxes not covered by his bond.

The collector shall serve for a term of one year and until his successor has been appointed and has qualified. The governing body may, during his term, remove him from office, for good cause shown, upon notice in writing and after giving him an opportunity to appear and be heard at a public session of said governing body: Provided, that no hearing shall be necessary in case of removal for failure to meet the conditions prerequisite prescribed by this article for the delivery of the tax books. Any vacancy caused by removal, resignation, death or otherwise shall be filled, for the unexpired term, by appointment of the governing body, unless otherwise provided by this article.

Appointments under this article shall be made during the first week in July, one thousand nine hundred thirty-nine, and annually thereafter. Until the first such appointments are made, city taxes shall be collected by the collectors now provided by law, notwithstanding any repealing clauses contained in this article.

Nothing in this section shall be construed to change the manner of appointment or term of any collector who collects both city and county taxes, or of any city collector whose manner of appointment or term is governed by the city charter. (1939, c. 310, s. 1701.)

- § 105-374. County sheriffs and tax collectors.—County and district taxes shall be collected by the sheriffs or tax collectors as provided by law: Provided, that district taxes levied by county commissioners and collected by county officials may, for collection and foreclosure purposes, be treated in the same manner as county taxes. (1939, c. 310, s. 1702.)
- § 105-375. General duties of tax collectors.—It shall be the duty of each tax collector to employ all lawful means for the collection of all taxes in his hands; to give such bond as may be required of him; to perform such duties in connection with the preparation of the tax records, receipts and stubs as the governing body may direct; to keep adequate records of all collections; and to account for all moneys coming into his hands. At each regular meeting of the governing body he shall submit a report of the amount collected on each year's taxes in his hands, the amount remaining uncollected, and the steps he is taking to encourage or enforce payment. The governing body may, at any time, require him to make settlement in full for all taxes in his hands. The governing body may also, at any time, require the collector to send out tax bills or notices, make personal calls upon delinquent taxpayers, or proceed to enforce payment by any lawful means. In addition to the taxes hereinbefore in this article defined, all license, privilege and franchise taxes levied by the taxing unit by which he is employed shall be collected by the collector.

The successor in office of any tax collector may continue and complete any process of tax collection, or any proceeding authorized by this article, begun by his predecessor. (1939, c. 310, s. 1703.)

§ 105-376. The tax lien and discharge thereof.—(a) Priority of the Tax Lien on Real Property.—(1) The lien of taxes shall attach to real property at the time hereinbefore in this subchapter prescribed.

(2) The liens of taxes of all taxing units shall be of equal dignity and shall be superior to all other assessments, charges, rights, liens, and claims of any and every kind in and to said property, regardless of by whom claimed and regardless of whether acquired prior or subsequent to the attachment of said lien for taxes: Provided, that nothing herein shall be construed as affecting such relative priority as may be prescribed by the Revenue Act for the lien of State taxes.

(3) The priority of the lien shall not be affected by transfer of title to the real property after the lien has attached, nor shall it be affected by death, receivership or bankruptcy of the owner of said property.

(b) Discharge of the Lien on Realty; Release of Separate Parcels.—The tax lien shall continue until the taxes, plus interest, penalties, and costs as allowed by

law, have been fully paid.

When the lien of taxes of any taxing unit for any year attaches to two or more parcels of real estate owned by the same taxpayer, said lien may be discharged as to any parcel, at any time prior to advertisement of tax foreclosure sale, in the following manner: (1) Upon payment, by or on behalf of the listing taxpayer, of the taxes for said year on the parcel or parcels sought to be released, with penalties and interest thereon, plus all personal property, poll and dog taxes owed by said taxpayer for the same year, with interest and penalties thereon, and all costs allowed by law; or (2) upon payment, by or on behalf of any person (other than said listing taxpayer) having an interest in said property, of the taxes for said year on the parcel or parcels sought to be released, with interest and penalties thereon, plus a proportionate part of personal property, poll and dog taxes owed by said listing taxpayer for the same year, with interest and penalties thereon, and a proportionate part of costs allowed by law. The proportionate parts shall be determined by the percentage of the total assessed value of the taxpayer's real estate represented by the assessed value of the parcel or parcels sought to be released.

Nothing in this section shall be construed to affect the rights of any holder of a tax sale certificate, other than a taxing unit, with respect to any certificate held on April 3, 1939.

When real estate listed as one parcel is subdivided, a part thereof may be released in the same manner, after the value of such part for tax purposes has been determined by the county tax supervisor or, if there is no supervisor, by the

county accountant, and certified by him to the collector.

It shall be the duty of every collector accepting a payment, made under this section for the purpose of releasing less than all of the taxpayer's real property, to give the person making the payment a receipt setting forth the description of such property appearing on the tax list and bearing a statement that such property is being released; and it shall also be his duty to indicate the property released on the official records of his office. In case of failure on the part of the collector to issue such receipt or make such record, the omission may be supplied at any time.

When any parcel of real estate has been released, under this section, from the lien of taxes of any taxing unit for any year, such property shall not thereafter be subject to the lien of any other regularly assessed taxes of the same taxing unit for the same year, whether such other taxes be levied against the listing owner of said property or against some other person acquiring title thereto. No tax foreclosure judgment for such other taxes shall become a lien on such released property; and, upon appropriate request and satisfactory proof of release by any interested person, the clerk of the superior court shall indicate on the judgment docket that such judgment is not a lien on said released property: Provided, that failure to make such entry shall not have the effect of making said judgment a lien on said released property.

(c) Priority of Lien on Personal Property.—The tax lien, when it attaches to personal property, shall, in so far as it represents taxes assessed against the property to which it attaches, be superior to all other liens and rights, whether such other liens and rights are prior or subsequent to the tax lien in point of time. In so far as said tax lien represents taxes not assessed against such property, said tax lien on personal property shall be inferior to prior valid liens and superior to all subsequent liens. As between the liens of different taxing units, the lien first at-

taching shall be superior.

(d) Preference Accorded Taxes in Liquidation of Debtor's Estates.—In all

cases in which a taxpayer's assets are in the hands of a receiver or assignee for the benefit of creditors, or are otherwise being liquidated or managed for the benefit of creditors, the taxes owed by such debtor, together with interest, penalties and costs, shall be a preferred claim, second only to administration expenses and specific liens: Provided, that this shall not be construed to modify or reduce the priority by this subchapter given to tax liens on real property or, in case of levy or attachment, the priority by this subchapter given to tax liens on personal property. (1939, c. 310, s. 1704.)

Duration of Lien. — The General Assembly, pursuant to the Constitution, has established the procedure for levying and collecting taxes, and when levied "The tax lien shall continue until the taxes, plus in-

terest, penalties, and costs, as allowed by law, have been fully paid." Charlotte v. Kavanaugh, 221 N. C. 259, 20 S. E. (2d) 97 (1942).

- § 105-377. All interested persons charged with notice of taxes.—All persons who have or may acquire any interest in any property which may be or may become subject to a lien for taxes are hereby charged with notice that such property is or should be listed for taxation, that taxes are or may become a lien thereon, and that if taxes are not paid such proceedings may be taken against said property as are allowed by law. Such notice shall be conclusively presumed, whether such persons have actual notice or not. (1939, c. 310, s. 1705.)
- § 105-378. Prepayments.—Payments on taxes, made before the tax books have been turned over to the collector, shall be made to such official as the governing body of the taxing unit may designate, and the official so designated shall give bond satisfactory to said governing body. If, at the time of such prepayment, the tax rate has not been finally fixed or the valuation of the taxpayer's property has not been finally determined, the prepayment may be made on the basis of the best information available to the collecting official. If it subsequently develops that there has been an overpayment, the excess shall be refunded by the taxing unit, without interest. If it develops that there has been an underpayment. the taxpayer shall be required to pay the balance due, and shall be allowed the same discount or charged the same penalty on such balance as in force with respect to other taxes for the same year at the time such balance is paid. Receipts issued for payments made on the basis of an estimate shall so state, and such receipts shall not release property from the tax lien; but official and final receipts, effecting such release, shall be made available to the taxpayer as soon as possible after determination that the tax has been fully paid. (1939, c. 310, s. 1706.)

§ 105-379. Delivery of tax books to collector; prerequisites thereto; procedure upon default.—(a) Time of Delivery.—The tax books shall be delivered to the collector, upon order of the governing body, on or before the first Monday in October, as hereinbefore in § 105-325 provided.

(b) Settlement and Bond as Prerequisites; Prepayments.—The tax books for the current year shall not be delivered to the collector until he shall have: (1) delivered to the chief accounting officer of the taxing unit the duplicates or stubs of such receipts as he may have issued for prepayments lawfully received by him; (2) demonstrated to the satisfaction of said chief accounting officer that all moneys received by him as such prepayments have been deposited to the credit of the taxing unit; (3) made his annual settlement, as hereinafter defined, for all taxes in his hands for collection; and (4) provided bond or bonds for the current taxes and all prior taxes in his hands for collection satisfactory to the governing body: Provided, that this shall not authorize any governing body of any unit to accept a bond of lesser amount than that prescribed by any valid local statute applying to said unit.

Any other official who has accepted prepayments shall, prior to the delivery of the tax books to the collector, deliver the prepayment receipt duplicates or stubs to the chief accounting officer of the unit and shall demonstrate to the satisfaction of said chief accounting officer that all moneys received by him as such prepayments have been deposited to the credit of the taxing unit: Provided, that where said chief accounting officer has himself lawfully accepted prepayments, he shall, not later than the day on which the tax books are delivered to the collector, make settlement therefor with the governing body in such manner and form as said governing body may prescribe.

It shall be the duty of said chief accounting officer: (1) to reduce the original charge made against the tax collector by deducting from the total amount of taxes levied so much of the amount received as prepayments as need not be refunded under the provisions of this article; (2) to secure and retain in his office, available to the taxpayers upon request, the regular receipts for taxes paid in full by prepayments, and to credit such payments on the tax books or accounts delivered to the collector; (3) to prepare refunds for overpayments made by way of prepayment (such disbursements to be made in the same manner as other disbursements of funds of the taxing unit are made); and (4) to credit all partial

prepayments as partial payments on the regular receipts or tax accounts.

(c) Procedure upon Default.—If, on or before the first Monday in October, the regular tax collector shall not meet the requirements prescribed in subsection (b), the governing body is hereby required immediately to appoint a special collector, not connected with the regular collector, and deliver to him the tax books for the current year. Said special collector shall give satisfactory bond in the same amount as would be required of the regular collector. He shall receive as compensation two per cent (2%) of his collections or such amount as may be fixed by the governing body; and the compensation received by him and the cost of his bond may, in the discretion of the governing body, be deducted from the compensation of the regular collector. If and when the regular collector shall make full settlement, in the manner hereinafter provided for collectors retiring from office, and shall then turn over the tax books to the regular collector.

(d) Civil and Criminal Penalties.—(1) Any member of the governing body of any taxing unit who shall vote to deliver the tax books or tax receipts to a tax collector, before said collector has met the requirements prescribed in this section, shall be individually liable for the amount of taxes due by said collector; and any such member so voting, or who willfully fails to perform any duty imposed by this section, shall be guilty of a misdemeanor, punishable by fine or imprisonment,

or both, in the discretion of the court.

(2) Any tax collector or other official who shall fail to account for prepayments received in the manner prescribed by this section, and any chief accounting officer failing to perform the duties imposed upon him by this section, shall be guilty of a misdemeanor, subject to fine or imprisonment, or both, in the discretion of the court. (1939, c. 310, s. 1707.)

§ 105-380. Installment payments.—The governing body of any taxing unit may, in its discretion, allow payment of taxes in not more than four equal installments, the last of which shall be payable not later than the week preceding the day fixed for the beginning of advertisement of the tax sale. The governing body of any unit permitting such installment payments, shall: (a) provide that, upon default in any installment, penalties shall accrue immediately upon the entire balance remaining unpaid at the same rate which would have accrued had such installment plan not been adopted; or (b) provide that, upon default in any installment, penalties shall accrue upon the amount of such installment at the same rate which would have accrued had such installment plan not been adopted. Payments made to taxing units adopting installment plans shall not be credited on any installment until all prior installments, together with any penalties thereon, have been paid.

It shall be the duty of each governing body and each collector of a taxing unit adopting an installment plan to indicate, on the tax receipts and on any bills or

notices sent to taxpayers, the due dates of the installments and the method by which penalties will be ascertained upon default in payment of any installment: Provided, that failure to fulfill this requirement shall not affect the validity of the taxes. (1939, c. 310, s. 1708.)

§ 105-381. Partial payments.—Unless otherwise directed by the governing body, the tax collector shall, at any time, accept partial payments on taxes and issue a partial payment receipt therefor. In crediting a payment on the tax for any year or on any installment, the payment shall first be applied to accrued penalties, interest and costs and then to the principal amount of such tax or installment. (1939, c. 310, s. 1709.)

§ 105-382. Payment of taxes; notes and checks.—Taxes shall be payable in existing national currency.

No tax collector shall accept a note of the taxpayer in payment of taxes.

Any collector may, in his discretion and at his own risk, accept checks in payment of taxes, and either issue the tax receipt immediately or withhold said receipt until the check has been collected. In any case in which a collector accepts a check and issues a receipt, and said check is thereafter returned unpaid, without negligence on the part of said collector in presenting said check for payment, the taxes for which said check was given shall be deemed unpaid; and the collector shall immediately correct his records and shall proceed to collect said taxes either by civil suit on the check or by the use of any remedy allowed for the collection of taxes: Provided, that the lien for said taxes shall be inferior to the rights of purchasers for value and of persons acquiring liens of record for value, when such purchasers or lienholders acquire their rights, in good faith and without actual knowledge that such check has not been collected, after examination of the collector's records during the time such records showed the taxes as paid or after examination of the official receipt issued to the taxpayer.

In addition to penalties for nonpayment of taxes provided by this subchapter, and in addition to any criminal penalties provided by law for the giving of worthless checks, the penalty for giving, in payment of taxes, a check which is returned because of insufficient funds or nonexistence of an account of the drawer, shall be ten per cent (10%) of the amount of such check, which shall be added to and

collected in the same manner as such taxes. (1939, c. 310, s. 1710.)

Editor's Note. — For acts authorizing counties and municipalities to accept deeds for real property in payment of taxes or special assessments and to sell such property, see Session Laws 1943, c. 465 (Catawba County and municipalities therein); c. 418 (Guilford County); c. 577 (Durham County and city of Durham); c. 533 (city of High Point).

Failure to Follow Statutory Procedure upon Return of Check.—The fact that a county tax collector accepted a check in payment of taxes, and the check was returned, and he paid the taxes in his settlement with the board of county commissioners, does not give him a lien which may be foreclosed under § 105-414. The collector having failed to correct the tax

record so as to show that the check had been returned and that the taxes were not paid, the tax lien was not reinstated. He could have protected himself and preserved the tax lien if he had followed the procedure outlined in this section; this he failed to do and the returned check was but a simple promise to pay. Since the provisions of this section enacted for the protection of the collector were not complied with and he elected to hold the returned check as evidence of the nonpayment of the taxes, he is in no better position than if he had accepted a note in lieu of the check. Miller v. Neal, 222 N. C. 540, 23 S. E. (2d) 852 (1943).

Stated in Miller v. McConnell, 226 N. C. 28, 36 S. E. (2d) 722 (1946).

§ 105-383. Statements of amount of taxes due.—Any tax collector shall, at the request of the owner or occupant of any land within the taxing unit, or of any person having a lien thereon or interest or estate therein, or of the duly authorized agent, or attorney of any such person, furnish a written certificate of the amount of the taxes and assessments levied upon such land for the current

year, if such amount has been definitely determined, and for all prior years for which taxes and assessments may be due, together with penalties, interest and costs accrued thereon: Provided, that this shall not require any collector to furnish information regarding taxes not in his hands for collection: Provided, further, that the person making such request shall specify in whose name said land was listed for taxation for each year for which such information is sought.

Any collector failing or refusing to furnish such certificate, upon request in good faith made as herein provided, shall be liable for a penalty of fifty dollars

(\$50.00). (1939, c. 310, s. 1711.)

- § 105-384. Place for collection of taxes.—Taxes shall be payable at the office of the collector: Provided, that the governing body of any taxing unit may for the convenience of the taxpayers, require the collector, in person or by deputy, to attend at other places, at times to be designated by said governing body, for the collection of taxes. Fifteen days' notice of such times and places shall be given by the collector by advertisement published in some newspaper published in the county, and, if there be no such newspaper published in the county, then by posting such notice at three or more places in said unit. (1939, c. 310, s. 1712.)
- § 105-385. Remedies against personal property.—(a) Time for.—From the first day of the fiscal year until taxes become due the collector shall not proceed against the personal property of the taxpayer, in the manner herein provided, unless there is reasonable ground for believing that the taxpayer is about to remove his property from the State. The collector may proceed against such personal property, in the manner herein provided, at any time after taxes are due and before filing of a tax foreclosure complaint or docketing of a judgment for said taxes as hereinafter provided. Every official charged with the duty of collecting taxes, current or delinquent, shall have power and authority to proceed against such personal property in the manner herein provided.

(b) Relation between Remedies against Personal Property and Remedies against Real Property.—The collector may proceed against the personal property of the taxpayer, as herein provided, in his discretion; and he shall proceed against such property: (1) if directed so to do by the governing body; or (2) upon demand by the taxpayer, mortgagee or other person holding a lien upon the real property of the taxpayer: Provided, that said taxpayer, mortgagee or other person making said demand shall furnish the collector with a written memorandum

describing such personal property and stating where it can be found.

After the sale of a tax sale certificate, no person shall be allowed to attack the validity of the sale on the ground that the tax should have been procured from personal property; but this shall not be construed as prohibiting proceedings

against personal property after said sale.

(c) Levy upon Personal Property.—Subject to the provisions of this article governing the priority of the lien acquired, the following property may be levied upon and sold for failure to pay taxes: (1) any personal property of the taxpayer, regardless of the time at which it was acquired and regardless of the existence or date of creation of mortgages or other liens thereon; (2) any personal property transferred by the taxpayer to relatives of the taxpayer; (3) personal property in the hands of a receiver for the taxpayer and in such cases it shall not be necessary for the collector to apply for an order of the court directing payment or authorizing the levy, but said collector may proceed as if the property were not in the hands of a receiver or in the custody of the law; (4) personal property of a deceased taxpayer: Provided, the levy is made prior to final settlement of the estate; (5) personal property transferred by the taxpayer, after the taxes levied for were due, by any type of transfer other than those hereinbefore mentioned in this subsection and other than by bona fide sale for value: Provided, the levy is made within sixty days after such transfer.

The levy and sale shall be governed by the laws regulating levy and sale under execution: Provided, that it shall not be necessary for said levy to be made or

said sale to be conducted by the sheriff, and the collector is hereby given the same authority as a sheriff to make said levy and conduct said sale. The collector shall be entitled to fifty cents for each levy and fifty cents for each actual sale. Said fees, plus actual advertising costs, shall be added to and collected in the same manner as the taxes. The advertising costs, when collected, shall be used to reimburse the taxing unit, which shall advance the cost of said advertising; and the levy and sale fees, when collected, shall be treated in the same manner as other fees collected by said official.

(d) Attachment and Garnishment.—Subject to the provisions of this article governing the priority of rights acquired, the collector may attach wages or other compensation, rents, bank deposits, the proceeds of property subject to levy and sale, or other property incapable of manual delivery: Provided, the same belongs to the taxpayer or has been transferred to another under circumstances which would permit it to be levied upon if it were tangible, or is due to the taxpaver or may become due to him within the calendar year; and the person owing same or having same in his possession shall become liable for the taxes to the extent of the amount he owes or has in his possession: Provided, that not more than ten per cent of wages or other compensation for personal services shall be liable to attachment and garnishment for failure to pay taxes.

To proceed under this subsection, the collector shall serve or cause to be served upon the taxpaver and the person owing or having in his possession the wages, rents, debts or other things sought to be attached, a notice showing at least: (1) the name of the taxpayer; (2) the amount of the taxes, penalties and costs (including the fees allowed by this subsection) and year or years for which such taxes were levied; (3) the name of the taxing unit or units by which such taxes were levied; (4) a brief description of the thing sought to be attached; and (5) a statement that the person served has the right to appear, within ten days after service, before some designated justice of the peace or (if the amount is beyond the jurisdiction of a justice of the peace) the superior court in the county in which the taxing unit lies, and show cause why he should not be compelled to pay said taxes, penalties and costs.

Notices concerning two or more taxpayers may be combined if they are to be served upon the same person, but in such case the taxes, penalties and costs

charged against each taxpayer must be set forth separately.

A copy of each notice shall be retained by the collector and a copy shall be filed, not later than the first business day following the day of service, with the justice or court before which the notice is returnable, together with a notation of service. Upon entry of judgment, by default or after appearance and hearing, in favor of the taxing unit, the person so served shall become liable for the taxes, penalties and costs: Provided, that payment shall not be required from amounts which are

to become due to the taxpayer until they actually become due.

The fee for serving said notice shall be fixed by the governing body of the taxing unit, not exceeding twenty-five cents if the tax is less than ten dollars and fifty cents if the tax is ten dollars or more: Provided, if the taxes of more than one taxpayer are included in the notice, the service fee shall not exceed fifteen cents per taxpayer. The justice's fee shall be twenty-five cents if the tax is less than ten dollars and one dollar if the tax is ten dollars or more plus one dollar for each hearing actually held, but no justices' fees shall be charged except in cases in which judgment is actually entered. Costs in the superior court shall be the same as in other proceedings therein. Fees and costs shall be added to and collected as part of the taxes: Provided, that if judgment is rendered against the taxing unit such costs and fees shall be paid by the taxing unit. All fees collected by officers shall be disposed of in the same manner as other fees collected by such officers.

(e) Employees of State and Its Subdivisions.—Tax collectors may proceed against the wages, salary or other compensation of officials and employees of this State and its agencies and instrumentalities and officials and employees of political subdivisions of this State and their agencies and instrumentalities in the manner provided by subsection (d) of this section. In such cases the notice shall be served upon the treasurer of the employing government or agency or instrumentality and, if there is no treasurer, then upon the chief financial officer thereof. In the case of notices served upon the State Treasurer, the notice shall state the place and character of the taxpayer's employment.

(f) Lists of Employees.—Any person, firm or corporation who shall, after written demand therefor, refuse to give the tax collector or tax supervisor a list of all employees of such person, firm or corporation who may be liable for taxes,

shall be guilty of a misdemeanor. (1939, c. 310, s. 1713.)

Sale by Assignee Prior to Levy.—Where an assignee for the benefit of the creditors of a taxpayer sells personal property of his assignor, on which a tax had been assessed, but not levied, prior to the assignment, the proceeds in the hands of the assignee are not subject to garnishment for the payment of the tax, but belong to the creditors. Shelby v. Tiddy, 118 N. C. 792, 24 S. E. 521 (1940).

A tax list in the hands of a tax collector

is equivalent to an execution and the tax collector, in lieu of selling real estate for the collection of taxes due thereon, may seize personal property belonging to the taxpayer and sell same or so much thereof as may be necessary for the satisfaction of all taxes due by the taxpayer. Apex v. Templeton, 223 N. C. 645, 27 S. E. (2d) 617 (1943).

Applied in Roach v. Pritchett, 228 N. C.

747, 47 S. E. (2d) 20 (1948).

8 105-386. Collection of taxes outside the taxing unit.—If a taxpayer has no property in the taxing unit to which the taxes are due, but does have property in some other unit, or if the taxpayer has removed from the taxing unit in which the taxes are due and has left no property there and is known to be in some other unit in this State, it shall be the duty of the collector to send a copy of the tax receipt, with a certificate stating that such taxes are unpaid, to the collector of the unit in which such property is located or in which such taxpaver is known to be. Such receipt and certificate shall have the force and effect of a tax list of his own unit in the hands of the collector receiving it, and it shall be the duty of such collector to proceed immediately to collect such taxes by any means by which he could lawfully collect taxes of his own unit. The collector receiving such receipt and certificate shall report, within thirty days after such receipt, to the collector who sent the same, either that he has collected the same or is unable to collect the same by any lawful means or that he has begun proceedings for the collection of same. All collections made under this section shall be remitted to the unit levying the tax within five days after such collection, but the collector making collection shall retain ten per centum of the amount thereof, which shall be for his personal use. All reports under this section, reporting that the tax is uncollectible, shall be under oath and shall state that the collector has used due diligence and is unable to collect said taxes by levy, garnishment or otherwise. Upon failure to make such sworn report the collector receiving such receipt and certificate shall be liable on his bond for such taxes.

It shall be the duty of the governing body of each taxing unit to require reports from the tax collector, at such times as it may prescribe (but not less frequently than in connection with each annual settlement), concerning the efforts he has made to locate taxpayers who have removed from the unit, the efforts he has made to locate property in other units belonging to delinquent taxpayers, and the efforts he has made under this section to collect the taxes. (1939, c. 310, s. 1714.)

§ 105-387. Sales of tax liens on real property for failure to pay taxes.—(a) Report of Delinquent Taxes Which Are Liens on Real Property.—The tax collector of each county and district shall, on the first Monday in April each year, and the tax collector of each city shall, on the second Monday in April each year, report a list of all taxpayers owing taxes for the current year which are liens on real property, and the governing body shall thereupon order sale of the tax lien on said real property of said taxpayers to be held at one of the times hereinafter prescribed. For purposes of all subsections of this section, district taxes collected by city tax collectors shall be regarded as city taxes.

(b) Date of Sale; Effect of Delay.—The county and district sale shall be held on the first Monday, and the city sale on the second Monday, in May or in any of the four succeeding months. Failure to hold said sale within the time prescribed shall not affect the validity of the taxes or the tax liens, nor shall it affect the validity of the sale when thereafter held. All sales held shall begin, in the case of county and district taxes, on the first Monday of the month and, in the case of city taxes, on the second Monday in the month: Provided, that where county and city taxes are collected by the same collector, the sale may be held on either of said Mondays.

No sale shall be delayed or restrained by order of any court of this State.

(c) Advertisement of Sale.—Public notice of the time, place and purpose of such sale shall be given by advertisement at the door of the courthouse or city hall for four successive weeks preceding such sale, and by advertisement once each week for four successive weeks preceding such sale in some newspaper published in the county. If there be no newspaper published in the county, such advertisement shall be posted in at least one public place in each township, in the case of county taxes, and in at least three public places in the city in the case of city taxes.

Said advertisement shall set forth, in addition to the time, place and purpose of such sale: (1) the name of each taxpayer owing taxes which are a lieu on real estate; (2) a brief description of the land listed in the name of each; (3) the principal amount of the taxes owed by each. Failure to include penalties and costs in the amount advertised shall not be construed as a waiver of same, but such advertisement shall state generally that the amounts advertised are subject to be increased by such penalties and costs.

(d) Place and Hour of Sale.—All county and district sales shall be held at the courthouse door, and city sales shall be held at the courthouse door or at the city hall door as the collector may advertise. All sales shall begin at such hour as may be specified in the advertisement, and they may be continued from day to day, if continuance is necessary in order to complete the sales, without further advertisement.

(e) Manner of Sale.—The sale may be conducted by the collector or any deputy designated by him for the purpose. The tax liens on all parcels advertised against one taxpayer shall be sold as one lot at public outcry to the highest bidder: Provided, that in case of county sales, liens on parcels in different townships may be sold separately. The collector may, in his discretion, demand immediate payment from any successful bidder, and reject such bid upon failure to comply with said demand. No bid shall be received unless for an amount at least equal to the principal amount of the taxes plus all penalties and costs accrued thereon. In the absence of a bid at least equal to such sum the taxing unit shall become the purchaser, without submitting a formal bid, for an amount equal to such sum.

In all cases in which bids are accepted which exceed such sum the tax collector shall immediately report such excess to the governing body, and said governing body shall order such excess paid directly to the person entitled thereto or order it paid to the clerk of superior court for distribution as the court may direct.

(f) Costs of Sale.—Costs of sale, which shall be included in the minimum sale price, shall consist of actual advertising cost and a sale fee not exceeding fifty cents (50c) per parcel. Actual advertising cost per parcel shall be determined by the collector, and may be determined upon an advertising lineage basis or an average cost per insertion basis or by any other reasonable method. The taxing unit shall pay all advertising expense, and all advertising cost collected shall be paid to it for use as its governing body may direct. All sale fees collected shall be treated in the same manner as other fees collected by said collector.

(g) Payments during the Advertising Period.—At any time between the beginning of the advertisement and the time of actual sale, any parcel may be withdrawn from the sale list by payment of taxes and penalties as required by law and a proportionate part of the advertising cost as determined by the collector. Thereafter, such parcel shall be eliminated from the advertisement: Provided, that fail-

ure to eliminate such parcel shall not subject the collector to liability if the lien on said parcel is not thereafter actually sold.

(h) Failure of Collector to Attend Sale.—If any collector shall fail to attend any duly advertised sale, in person or by competent deputy, he shall be guilty of a misdemeanor and liable on his bond to a penalty of three hundred dollars.
(i) Land Listed in Wrong Name.—No sale shall be void because such real es-

(i) Land Listed in Wrong Name.—No sale shall be void because such real estate was charged in the name of any other person than the rightful owner, if such real estate be in other respects correctly described on the tax list: Provided, no sale of the lien on real estate listed in the name of the wrong person shall be valid when the rightful owner has listed the same and paid the taxes thereon.

valid when the rightful owner has listed the same and paid the taxes thereon.

(j) Irregularities Immaterial.—No irregularities in making assessments or in making the returns thereof in the equalization of property as provided by law, or in any other proceeding or requirement, shall invalidate the sale of tax liens on real estate or sale of real estate in tax foreclosure proceedings, nor in any manner invalidate the tax levied on any property or charged against any person. The following defects, omissions, and circumstances occurring in the assessment of any property for taxation, or in the levy of taxes, or elsewhere in the course of the proceedings, shall be deemed to be irregularities within the meaning of this subsection; the failure of the assessors to take or subscribe an oath or attach an oath to an assessment roll; the omission of a dollar mark or other designation descriptive of the value of figures used to denote an amount assessed, levied, or charged against any property or the valuation of any property upon any record; the failure to make or serve any notice mentioned in this chapter; the failure or neglect of the collector to offer any tax lien or real estate for sale at the time mentioned in the advertisement or notice of such sale; failure of the collector to adjourn the sale from day to day, or any irregularity or informality in such adjournment; any irregularity or informality in the order or manner in which tax liens or real estate may be offered for sale; the failure to assess any property for taxes or to levy any tax within the time prescribed by law; any irregularity, informality or omission in any such assessment or levy; any defect in the description, upon any assessment book, tax list, sales book, or other record, of real or personal property, assessed for taxation, or upon which any taxes are levied, or which may be sold for taxes, provided such description be sufficiently definite to enable the collector, or any person interested, to determine what property is meant or intended by the description, and in such cases a defective or indefinite description, on any book, list, or record, or in any notice or advertisement, may be made definite by the collector at any time by correcting such book, list or record, or may be made definite by using a correct description in any tax foreclosure proceeding authorized by this subchapter, and any such correction shall have the same force and effect as if said description had been correct on the tax list; any other irregularity, informality, or omission or neglect on the part of any person or in any proceedings, whether mentioned in this subsection or not; the neglect or omission to tax or assess for taxation any person or property; the overtaxation of persons or property liable to be taxed.

(k) Acts of De Facto Officers.—In all actions, proceedings, and controversies involving the title to real property held under and by virtue of a tax sale or any tax foreclosure proceedings authorized by this article, all acts of assessors, clerks, sheriffs, collectors, supervisors, commissioners and other officers de facto shall be deemed and construed to be of the same validity as acts of officers de jure.

(1) Proof of Sale.—The books and records of the office of the collector making the sale, or copies thereof properly certified, shall be deemed sufficient evidence to prove the sale of the tax lien on any real property under this section, the redemption thereof or the payment of taxes thereon.

(m) Wrongful Sale.—Any collector or deputy collector who shall sell, or assist in selling, the tax lien on any real property, knowing the same not to be subject to taxation, or that the taxes for which the lien is sold have been paid, or shall knowingly and willingly sell or assist in selling the tax lien on any real property

for payment of taxes to defraud the owner of such real property, or shall knowingly and willingly cause foreclosure proceedings to be instituted against real property so sold, shall be guilty of a misdemeanor, and be liable to a fine of not less than one thousand nor more than three thousand dollars, or to imprisonment not exceeding one year, or to both fine and imprisonment, and to pay the injured

party all damages sustained by such act; and all such sales shall be void.

When by mistake or wrongful act of the collector a tax lien on real property has been sold on which no tax was due, the taxing unit shall reimburse the purchaser by paying to him the amount expended by him in such purchase, with interest thereon at six percent per annum; and the collector shall be liable to the taxing unit upon his bond for all amounts so expended by it in excess of the amount received by it from said sale. Any amount paid by a taxing unit under this section for State taxes shall, on proper certificate from the chairman of the governing body, be allowed by the Auditor and paid by the Treasurer of the State, and the State shall have the right of recovery against the collector on his bond to the amount so paid.

(n) Joint Sales by Several Taxing Units.—Wherever the taxes of two or more taxing units are collected by the same collector, one sale shall be held for the taxes of both at such time as is prescribed by law for sales by either; and in the absence of bids the larger unit may become the purchaser, or such units may become joint purchasers, for the benefit of all according to their respective interests: Provided, that this shall not repeal any local law designating the purchaser

in case of joint sales. (1939, c. 310, s. 1715.)

Local Modification. — Cumberland: 1941, c. 44, s. 1(a); Mecklenburg: 1945, c. 16, s.

5; Wayne: 1941, c. 40.

The power to sell real estate for taxes was repealed by c. 310, Laws 1939, and the sheriff or tax collector is limited to the sale of the tax lien. Crandall v. Clemmons, 222 N. C. 225, 22 S. E. (2d) 448 (1942).

The tax lien can be enforced only by an

action in the superior court in the county in which the land is situated in the nature of an action to foreclose a mortgage. Crandall v. Clemmons, 222 N. C. 225, 22 S. E. (2d) 448 (1942). See § 105-391.

Cited in Duplin County v. Ezzell, 223 N. C. 531, 27 S. E. (2d) 448 (1943); Newton v. Chason, 225 N. C. 204, 34 S. E. (2d) 70

(1945).

§ 105-388. Certificates of sale.—(a) Issued to Private Purchasers.— As soon as possible after sale, but not earlier than payment of the purchase price, the collector shall issue to each successful bidder, other than taxing units, a certificate of sale, for the tax lien on real property of each delinquent, purchased by him, dated as of the day of sale. Property held jointly by two or more owners shall be construed as the property of one delinquent for this purpose. Said certificate shall be in substantially the following form:

by certify that the tax lien on the following described real property in said taxing unit, to wit: (describing the same), was, on the day of, duly sold by me in the manner provided by law, for the delinquent taxes of for the year, amounting to \$...., including penalties thereon and costs allowed by law, when and where (name of purchaser) purchased said lien on said real property at the price of \$....., said amount being the highest and best bid for same. And I further certify that unless payment of said lien is made, within the time and in the manner provided by law, said (name of purchaser), his heirs or assigns, shall have the right to foreclose said real property by any proceeding allowed by law.

"In witness whereof, I have hereunto set my hand this day of

Tax Collector."

A copy of each such certificate shall be retained by the collector in a special book or file designated "Certificates of Sale for Taxes for the Year" All payments made on any such certificate shall be made to the collector for the use of the owner of such certificate, and all such payments shall be credited by the collector on the copy of the certificate in his possession, and shall be remitted to the owner of the certificate upon proper receipt therefor. For failure to account for and pay over any such payments the collector shall be liable on his bond to the person entitled thereto. The copies of such certificates in the collector's office shall be the official records for the purpose of determining whether a lien exists in favor of any certificate owner other than a taxing unit. The owner of a certificate may assign it at any time, but said assignment shall not be effective until the collector shall have actually received written notice thereof from the assignor. Each such purchaser, his heirs or assignees, shall have a lien on the real property for the amount of the purchase price, plus interest thereon at the rate of six per centum per annum, of the same dignity as similar liens owned by taxing units, and shall have the right to foreclose said lien, by action in the nature of an action to foreclose a mortgage, in the manner hereinafter prescribed: Provided, that the six per cent per annum interest herein provided shall accrue only on so much of the purchase price as represents the amount of the tax, penalties to the date of sale, and the costs of advertising and sale. Each such purchaser, his heirs and assignees, shall also have a lien for other taxes and assessments levied against said property, paid by him after acquisition of said certificate, whether such taxes or assessments were charged before or after such acquisition. Said lien shall be entitled to the same priorities as the original lien of the taxes and assessments so paid.

- (b) Issued to Taxing Units.—The governing body of each taxing unit which becomes the purchaser at a tax sale, as hereinbefore provided, shall determine whether or not it is necessary to issue certificates to and in the name of such unit. If, in the opinion of said governing body, the issuance of such certificates is not necessary in order to provide adequate records of tax liens and tax collections, the said certificates may be dispensed with and the collector ordered to mark or stamp the original tax receipts or accounts "Sold to (name of they shall be issued in substantially the form set forth in subsection (a) of this section, with stubs or duplicates on which shall be reflected all payments or assignments. In either case, the taxing unit shall have the right to foreclose the real property by any method authorized by law; and in either case interest at the rate of six per cent per annum shall accrue, on the amount bid by said unit, from the date of the sale.
- (c) Prima Facie Case.—A certificate issued, or a tax receipt or account marked or stamped, in accordance with the provisions of subdivisions (a) or (b) of this section, shall be presumptive evidence of the regularity of all prior proceedings incident to the sale and of the due performance of all things essential to the validity thereof. (1939, c. 310, s. 1716; 1945, c. 247, ss. 1, 2.)

Local Modification. — Bladen: 1945, c. 267; Camden: 1943, c. 705; Cumberland: 1941, c. 44, s. 1(b); Franklin (towns of Runn, Louisburg and Youngsville): 1943, c. 293; Surry (and towns of Elkin and Mount Airy): 1943, c. 710, s. 6.
Editor's Note. — The 1945 amendment

changed the rate of interest mentioned in subsections (a) and (b) from eight to six per cent. The amendatory act provided that it should not affect the interest rate on outstanding certificates issued prior to its ratification on Feb. 23, 1945.

105-389. Assignment of liens by taxing unit after sale.—At any time after the sale hereinbefore provided for, any taxing unit may assign any lien owned by it to any person who pays an amount which, if paid by the taxpayer, would be sufficient to discharge said lien. If a certificate has already been issued to the taxing unit, it shall be assigned to the person making the payment, and the copy of stub of such certificate or a copy of such stub, showing such assignment, shall be filed in the manner provided for certificates originally issued to private purchasers. If no certificate has been issued to the taxing unit, a certificate shall

immediately be so issued, and said certificate shall be assigned to the person making such payment in the manner set forth in the preceding sentence. The collector to whom the payment is made shall have authority to make all such assignments and issue all such certificates.

The provisions of this section shall be construed as being in addition to the provisions of this article with respect to release of individual parcels of real property from the tax lien. The person making a payment, after the sale hereinbefore provided for, shall have the right to pay the entire amount or to pay an amount sufficient under the provisions of this article to release one or more specified parcels; and such person shall also have the right to demand either assignment of the lien on the property for which the payment is made or to demand complete release of such property from the lien, in his discretion. In cases in which an assignment is made upon payment of an amount less than the amount of the lien on all the real property in one certificate, new certificates may be made to effect the separation. (1939, c. 310, s. 1717.)

Local Modification. — Cumberland: 1941, c. 44, s. 1(c). Cited in Duplin County v. Ezzell, 223 N. C. 531, 27 S. E. (2d) 448 (1943).

§ 105-390. Settlements.—(a) Annual Settlement of Tax Collector.—(1) Preliminary report. On the second Monday following the sale of certificates, the tax collector shall, under oath, report to the governing body: (1) action with respect to such sale; and (2) a list of those not listing land for taxes whose taxes remain unpaid, making oath that he has made diligent effort to collect such taxes out of the personal property of such taxpayers or by other means open to him for collection of such taxes, and reporting such other information as to such taxpayers as may be of interest to or required by the governing body (including a report on his efforts to make collection outside the taxing unit under the provisions of this article.)

(2) Insolvents. The governing body shall, upon receipt of said report, enter upon its minutes the list of such taxpayers listing no land as may be found by said governing body to be insolvents, and shall by resolution designate said list so entered in the minutes as the insolvent list to be credited to the collector in

his settlement.

(3) Settlement for current taxes. On the first Monday of the month following sale of certificates, but not earlier than the first Monday of July, the collector shall make full settlement with the governing body of the taxing unit for all taxes, in his hands for collection, for the year involved in said sale. In such settlement the collector shall be charged with: (1) the total amount of all taxes for said year, in his hands for collection, including amounts originally charged to him and all subsequent amounts charged on account of discovered property; (2) all penalties, interest and costs collected by him in connection with taxes for said year; and (3) all other sums to be collected by said collector. He shall be credited with: (1) all sums deposited by him to the credit of the taxing unit, or receipted for by the proper official of said unit, on account of taxes for said year; (2) releases allowed by the governing body as prescribed by statute; (3) the principal amount of taxes included in certificates sold to the taxing unit, for which he shall produce certificates duly executed or receipts or accounts duly stamped in accordance with the provisions of this article; (4) the principal amount of taxes for said year included in the insolvent list, determined as hereinbefore provided; (5) discounts allowed by law; and (6) commissions, if any, lawfully payable to him as compensation. For any deficiency the collector shall be liable on his bond, and, in addition, thereto, shall be liable to all criminal penalties provided by law.

Said settlement, together with the action of the governing body with respect thereto, shall be entered in full upon the minutes of said governing body.

(4) Disposition of tax books after settlement. Uncollected taxes allowed as credits in the settlement prescribed in the preceding subsection, whether rep-

resented by sales to the taxing unit or included in the list of insolvents, shall be recharged to the collector or charged to some other person, in accordance with the provisions of any valid local statute governing tax collection in the particular taxing unit. In the absence of any local statute determining the matter: (1) Such taxes in cities, and in counties having tax collectors other than sheriffs, shall be recharged to the collector; and (2) such taxes, in counties having sheriffs as tax collectors, shall be charged to such other county officer or employee as the governing body may designate to perform the duties of delinquent tax collector.

The person so charged or recharged shall give bond satisfactory to the governing body; shall receive the tax receipts, certificates and records representing such uncollected taxes; shall have and exercise and perform all powers and duties conferred or imposed by law upon tax collectors; and shall receive such compensation as may be fixed by valid local statute or, in the absence of such statute, as

the governing body may determine.

(b) Settlements for Delinquent Taxes.—Annually, at the time prescribed for the settlement hereinbefore in this section provided, all persons having in their hands for collection any taxes for years prior to the year involved in said settlement hereinbefore provided, shall settle with the governing body of the taxing unit for collections made on the taxes for each such prior year. Such settlement for the taxes of prior years shall be in such form as may be satisfactory to the chief accounting officer and the governing body of the taxing unit, and shall be entered in full upon the minutes of the governing body.

(c) Settlement at End of Term.—Whenever any tax collector or other person collecting taxes, current or delinquent, shall fail to succeed himself at the end of his term of office, he shall, on the last business day of his term, make full and complete settlement for all taxes in his hands and deliver the tax records, receipts and accounts to his successor in office. Such settlement shall be in such manner and form as may be satisfactory to the chief accounting officer and governing body of the taxing unit, and shall be entered in full upon the minutes of the governing

body.

- (d) Settlement upon Vacancy During Term.—In case of voluntary resignation of any person collecting taxes he shall, upon his last day in office, make full settlement for all taxes in his hands in the same manner as required herein for settlements made at the end of a term of office. In default of such settlement, or in case of a vacancy occurring during a term for any other reason, it shall be the duty of the chief accounting officer or, in the discretion of the governing body, of some duly qualified person appointed by it, immediately to prepare and submit to the governing body a report in the nature of a settlement made on behalf of the excollector; and such report, together with the action of the governing body, shall be entered in full upon the minutes of the governing body. In such cases the governing body may turn over the tax books to the successor collector immediately upon occurrence of the vacancy, or may make such temporary arrangements for collection of taxes as may be expedient: Provided, that no person shall be permitted to collect taxes until he shall have given bond satisfactory to the governing body.
- (e) Effect of Approval.—Approval of any settlement by the governing body shall not relieve the collector or his bondsmen of liability for any shortage actually existing and thereafter discovered; nor shall it relieve the collector of any criminal liability.

(f) Penalties.—In addition to all other civil and criminal penalties, provided by law, any member of a governing body, collector, person collecting taxes, or chief accounting officer failing to perform any duty imposed upon him by this section shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court.

(g) The county commissioners of the several counties of the State of North Carolina are hereby authorized and empowered in their discretion to relieve the

tax collector, sheriff, or other officer charged with the collection of taxes of and from the charges of all insolvent taxes, five years or more delinquent, when it appears to the satisfaction of the board of commissioners of any county that said taxes are uncollectible. (1939, c. 310, s. 1718; 1949, c. 730.)

Local Modification. — Cumberland: 1941, c. 44, s. 1(d), (e); Jackson: 1947, c. 17, s. 13; Mecklenburg: 1945, c. 16, s. 6.

Cross Reference.—For earlier statute relating to settlement, see § 105-424.

Editor's Note. — The 1949 amendment

added subsection (g).

Legislative Power to Penalize. — The legislature has the power to impose penalties on the sheriff for his delay or failure to make settlement with the proper county authorities within a stated time. State v. Gen-

try, 183 N. C. 825, 112 S. E. 427 (1922), wherein the court said: "The power to coerce prompt collection and settlement of taxes is no less necessary than the power to levy and assess them, and both are essential to the maintenance of the government."

An extension of time, within which a sheriff may settle State taxes, does not exonerate the sureties upon his bond. Worth v. Cox, 89 N. C. 44 (1883).

Applied in Berry v. Davis, 158 N. C. 170, 73 S. E. 900 (1912).

§ 105-391. Foreclosure of tax liens by action in nature of action to foreclose a mortgage.—(a) Time for Beginning Such Action.—Actions for the foreclosure of tax liens brought under this section shall be brought not less than six months after the sale hereinbefore provided for.

(b) Private Purchasers.—Foreclosure under this section shall be the sole

remedy of certificate owners other than taxing units.

(c) Taxing Units.—Taxing units may proceed under this section, either on the original tax lien or the lien acquired at the tax sale hereinbefore provided for, with or without a certificate of sale, and the amount of recovery in either case shall be the same. To this end it is hereby declared that the original attachment of the tax lien is sufficient to support a tax foreclosure action by a taxing unit, that the issuance of tax sale certificates to a taxing unit is a matter of convenience in record keeping, within the discretion of the governing body of such unit, and that issuance of such certificates is not a prerequisite to perfection of said tax lien.

(d) General Nature of the Action.—The foreclosure action shall be an action in superior court, in the county in which the land is situated, in the nature

of an action to foreclose a mortgage.

(e) Parties; Summons.—The listing taxpayer and spouse, if any, the current owner, all other taxing units having tax liens, all other lien-holders of record, and all persons who would be entitled to be made parties to a court action (in which no deficiency judgment is sought) to foreclose a mortgage on such property, shall be made parties and served with summons in the manner provided by § 1-89: Provided, that service by publication may be begun at any time within two years after the issuance of the original summons and that alias and pluries summonses may be issued as provided by § 1-95.

The fact that the listing taxpayer or any other defendant is a minor, is incompetent or is under any other disability shall not prevent or delay the collector's sale or the foreclosure of the tax lien; and all such defendants shall be made defendants and served with summons in the same manner as in other civil actions.

Persons who have disappeared or cannot be located and persons whose names and whereabouts are unknown, and all possible heirs or assignees of such persons may be served by publication; and such persons, their heirs and assignees may be designated by general description or by fictitious names in such action. It is hereby declared that service of summons by publication against such persons, in the manner provided by law, shall be as valid in all respects as such service against known persons who are nonresidents of this State.

(f) Complaint as a Lis Pendens.—The complaint in an action brought under this section shall, from the time of the filing thereof in the office of the clerk of superior court, serve as notice of the pendency of such action, and every person whose interest in such property is subsequently acquired or whose interest therein is sub-

sequently registered or recorded shall be found by all proceedings taken in such action after the filing of said complaint in the same manner as if said persons had been made parties to such action. It shall not be necessary to have said complaint cross indexed as a notice of action pending to have the effect prescribed by this subsection.

(g) Subsequent Taxes.—The complaint in a tax foreclosure action brought under this section by a taxing unit shall, in addition to alleging the tax lien on which the action is based, include a general allegation of subsequent taxes which are or may become a lien on the same property in favor of the plaintiff unit. Thereafter is shall not be necessary to amend said complaint to incorporate said taxes by specific allegation. In case of redemption before judgment of confirmation, the person redeening shall be required to pay, before said action is discontinued, at least all taxes on said property which have at the time of discontinuance been due to plaintiff unit for more than one year, plus interest, penalties and costs thereon. Immediately prior to judgment of sale in such action, if there has been no redemption, the tax collector, or the attorney for plaintiff unit, shall file in said action a certificate setting forth all taxes which are a lien on said property in favor of the plaintiff unit, other than taxes the amount of which has not been definitely determined.

Any plaintiff in a tax foreclosure action, other than a taxing unit, may include in his complaint, originally or by amendment, all other taxes and assessments paid by

him which were liens on the same property.

(h) Joinder of Parcels.—All real estate within one township, subject to liens for taxes levied against the same taxpayer by the same taxing unit for the first year involved in the action, shall be joined in one action: Provided, that where property is transferred by the listing taxpayer subsequent to such year, all subsequent taxes, penalties, interest and costs, for which said property is ordered sold under the terms of this subchapter, shall be prorated to such property in the same manner as if payments were being made to release such property under the provisions of this subchapter.

(i) Special Benefit Assessments.—A cause of action for the foreclosure of the lien of any special benefit assessment may be included in any complaint filed under

this section.

(j) Joint Foreclosure by Two or More Taxing Units.—Liens of different taxing units on the same parcel, representing taxes in the hands of the same collector, shall be foreclosed in one action. Liens of different taxing units of the same parcel, representing taxes in the hands of different collectors, may be fore-

closed in one action in the discretion of the governing bodies.

Liens of taxing units made parties defendant in any such action shall be alleged in an answer filed by such unit, and the collector of each such answering unit shall, prior to judgment, file a certificate of subsequent taxes similar to that filed by the collector of the plaintiff unit, and the taxes of each such answering unit shall be of equal dignity with the taxes of the plaintiff unit; and any such answering unit may, in case of payment of the plaintiff's taxes, continue such action until all taxes due to it for more than one year have been paid. It shall not be necessary for any such defendant unit to file a separate foreclosure action or proceed under § 105-392 with respect to any such taxes.

All taxes of any taxing unit which is properly served as a party defendant in such action, and which does not answer and file the certificate as aforesaid, shall be barred by the judgment of sale except to the extent that the purchase price at foreclosure sale, after payment of costs and of the liens of all taxing units whose liens are properly alleged by complaint or answer and certificates, may be sufficient to pay said taxes: Provided, that if a defendant unit is plaintiff in another action pending against the same property, or has begun a proceeding under § 105-392, its answers may allege said fact in lieu of alleging its liens, and the court, in its discretion, may order consolidation of such actions or such other

disposition thereof, and such disposition of the costs therein, as it may deem advisable: And provided, further, that any such order may be made by the clerk of the superior court, subject to appeal in the same manner as appeals are taken from other orders of said clerk.

(k) Costs.—Costs may be taxed in any action brought under this section in the same manner as in other civil actions, subject to the provisions of this subsection; and upon collection of said costs, either upon redemption or upon payment of the purchase price at foreclosure sale, the fees allowed officers shall be paid to those entitled to receive the same: Provided, that the fees allowed any officer, whether for the personal use of such officer or for the benefit of the unit of which he is an official shall not exceed one-half the fees allowed in other civil actions: Provided, further, that no process tax for the use of the State shall be levied or collected in tax foreclosure actions, and, where the plaintiff is a taxing unit, no

prosecution bond shall be required in such actions.

Said costs may include one reasonable attorney's fee for the plaintiff, which shall not exceed five dollars: Provided, that the governing body of any unit may, in its discretion, pay a greater sum to its attorney as a suit fee and said governing body may, in its discretion, allow a reasonable commission to its attorney on delinquent taxes collected by him after said taxes have been placed in his hands; or said governing body may arrange with its attorney for the handling of tax suits on a salary basis or make such other reasonable agreement with its attorney or attorneys as said governing body may approve; and any arrangement made may provide that attorney's fees collected as costs be collected for the use of the taxing unit: And provided, further, that when any taxing unit is made a party defendant in a tax foreclosure action and files answer therein, there may be included in the costs an attorney's fee for said defendant not exceeding three dollars.

In any action in which real property is actually sold after judgment, costs shall include a commissioner's fee to be fixed by the court, not exceeding five per centum of the purchase price; and in case of redemption between the date of sale and judgment of confirmation, said fee shall be added to the amount otherwise necessary for redemption. In case more than one sale is made of the same property in any action, the commissioner's fee may be based on the highest amount bid, but said commissioner shall not be allowed a separate fee for each such sale. The governing body of any plaintiff unit may request the court to appoint as commissioner a salaried official, attorney or employee of the unit and, if such appointment is made, may require that such commissioner's fees, when collected, be paid to plaintiff unit for use as it may direct.

(1) Contested Actions.—Any action brought under this section, in which an answer raising an issue requiring trial is filed within the time allowed by law, shall

be entitled to a preference as to time of trial over all other civil actions.

(m) Judgment of Sale.—Any judgment in favor of the plaintiff or any defendant taxing unit in an action brought under this section shall order the sale of the property, or so much thereof as may be necessary for the satisfaction of: (1) taxes adjudged to be liens in favor of the plaintiff, other than taxes the amount of which has not been definitely determined, together with interest, penalties and costs thereon; and (2) taxes adjudged to be liens in favor of other taxing units, other than taxes the amount of which has not yet been definitely determined, if said taxes have been alleged in answers filed by said units, together with interest, penalties and costs thereon.

Said judgment shall appoint a commissioner to conduct said sale and shall order that the property be sold in fee simple, free and clear of all interests, rights, claims and liens whatever, except that said sale shall be subject to taxes the amount of which cannot be definitely determined at the time of said judgment, subject to taxes and assessments of taxing units which are not parties to said action, and, in the discretion of the court, subject to taxes alleged in other tax foreclosure

actions or proceedings pending against the same property.

In all cases in which no answer is filed within the time allowed by law, and in cases in which answers filed do not seek to prevent sale of said property, the clerk of the superior court may render said judgment, subject to appeal in the same manner as appeals are taken from other judgments of said clerk.

- (n) Advertisement of Sale.—The sale shall be advertised, and all necessary resales shall be advertised, in the manner provided by §§ 1-327, 1-328, or by such statute as may be enacted in substitution therefor.
- (o) Sale.—The sale shall be by public auction to the highest bidder, and shall, in accordance with the judgment, be held at the courthouse door on any day of the week except a Sunday or legal holiday: Provided, that in actions brought by any city which is not a county seat the court may, in its discretion, direct said sale to be held at the city hall door. The commissioner conducting such sale may, in his discretion, require from any successful bidder a deposit equal to not more than twenty per centum of his bid, which said deposit, in the event that said bidder refuses to take title and a resale becomes necessary, shall be applied to pay the costs of sale and any loss resulting: Provided, that this shall not deprive the commissioner of the right to sue for specific performance of the contract.
- (p) Report of Sale.-Within three days following said sale the commissioner shall report said sale to the court, giving full particulars thereof.
- (q) Exceptions and Increased Bids.—At any time within ten days after the filing of said report of sale any person having an interest in the property may file exceptions to said report, and at any time within said period an increased bid may be filed in the amount specified by and subject to the provisions (other than provisions in conflict herewith) of § 45-28, or to the provisions (other than provisions in conflict herewith) of any law enacted in substitution for said section.
- (r) Judgment of Confirmation.—At any time after the expiration of said ten days, if no exception or increased bid has been filed, the commissioner may apply for judgment of confirmation; and in like manner he may apply for such judgment after the court has passed upon any exceptions filed, or after any necessary resales have been held and reported and ten days have elapsed: Provided that the court may, in its discretion, order resale of the property, in the absence of exceptions or increased bids, whenever it deems such resale necessary for the best interests of

Said judgment of confirmation shall direct the commissioner to deliver the deed upon payment of the purchase price.

Said judgment may be rendered by the clerk of superior court, subject to appeal in the same manner as appeals are taken from other judgments of said clerk.

(s) Application of Proceeds of Sale; Final Commissioner's Report.—After delivery of the deed and collection of the purchase price, the commissioner shall apply the proceeds as follows; first, to payment of all costs of the action, including commissioner's fee and attorney's fee, which said costs shall be paid to the officials or funds entitled thereto; then to the payment of taxes, penalties and interest for which said property was ordered to be sold, and in case the funds remaining are insufficient for this purpose they shall be distributed pro rata to the various taxing units for whose taxes the property was ordered sold; then pro rata to the payment of any special benefit assessments for which said property was ordered sold, together with interest and costs thereon; then pro rata to payment of taxes, penalties, interest and costs of taxing units which were parties to said action but which filed no answers therein; then pro rata to payment of special benefit assessments of taxing units which were parties to said action but which filed no answers therein, together within interest and costs on said assessments; and any balance then remaining shall be paid in accordance with any directions given by the court and, in the absence of such directions, shall be paid into court for the benefit of the persons entitled thereto. The commissioner in all such cases shall make a full report to the court, within five days after delivery of the deed, showing delivery of

the deed, receipt of the purchase price, and the disbursement of the proceeds, accompanied by receipts evidencing all such disbursements.

In case the purchaser is a taxing unit such unit may proceed in accordance with the provisions hereinafter set forth in this section; and the commissioner shall

make report accordingly.

(t) Bids by Taxing Units.—Any taxing unit, or two or more units jointly, may bid at foreclosure sale, and any taxing unit which becomes the successful bidder may assign its bid, or portion thereof, at any time, by private sale, for not less than the amount thereof.

(u) Payment of Purchase Price by Taxing Units; Status of Property Purchased by Taxing Units.—Any taxing unit which becomes the purchaser at final tax foreclosure sale may, in the discretion of its governing body, pay only such part of the purchase price as would not be distributed to itself and other taxing units on account of taxes, interest, penalties and such costs as accrued prior to the beginning of the foreclosure action. Thereafter, in such case, it shall hold said property for the benefit of all taxing units which have an interest in such property as hereinafter in this subsection defined. All net income from said property and the proceeds thereof, when resold, shall be first used to reimburse the purchasing unit for disbursements actually made by it in connection with the foreclosure action and the purchase of said property, and any balance remaining shall be distributed to the taxing units having an interest therein in proportion to their interests. The total interest of each taxing unit, including the purchasing unit, shall be determined by adding: (1) taxes of such unit, with interest, penalties and costs (other than costs already reimbursed to the purchasing unit), to satisfy which said property was ordered sold; (2) other taxes of such unit, with interest, penalties and costs, which would have been paid from the purchase price had said purchase price been paid in full; (3) taxes of such unit, with interest, penalties and costs, to which said sale was made subject; and (4) the principal amount of all taxes which may become liens on said property after purchase at foreclosure sale or which would have become liens but for such purchase: Provided, that no amount shall be included under clause (4) hereof for taxes for years in which, on the tax listing day, said property is being used by said purchasing unit for a public purpose.

If the amount of net income and proceeds of resale distributable exceeds the total interests of all units hereinbefore defined, the remainder shall be applied to any special benefit assessments to satisfy which said sale was ordered or to which said sale was made subject, and any balance then remaining shall accrue to the pur-

chasing unit.

When any property, purchased as hereinbefore provided in this subsection, is permanently dedicated for use for a public purpose, the purchasing unit shall make settlement with other taxing units having an interest in such property, as hereinbefore defined, in such manner and in such amount as may be agreed upon by the governing bodies; and if no agreement can be reached the amount to be paid shall be determined by the resident judge of the superior court.

Nothing in this subsection shall be construed as requiring the purchasing unit to secure the approval of other interested taxing units before reselling said property or as requiring said purchasing unit to pay said other units in full if the

net income and resale price are insufficient to make such payments.

Any taxing unit purchasing property at foreclosure sale may, in the discretion of its governing body, instead of following the foregoing provisions of this subsection, make full payment of the purchase price and thereafter it shall hold said property as sole owner in the same manner as it holds other real property, subject only to taxes and assessments, with interest, penalties and costs, to which said sale was made subject.

(v) Resale of Property Purchased by Taxing Units.-Property purchased at tax foreclosure sale by a taxing unit may be resold at any time for such price as the governing body may approve. Such resales shall be conducted in the manner provided by law for sales of other property of the various taxing units: Provided, that a city may, in the discretion of its governing body, resell such property to former owner or other person formerly having an interest in said property, at private sale, for an amount not less than its interest therein, if it holds said property as sole owner, or for an amount not less than the total interests of all taxing units (other than assessments due the city holding title), if it holds said property for the benefit of all such units. (1939, c. 310, s. 1719; 1945, c. 635; 1947, c. 484, ss. 3, 4.)

Local Modification. — Cumberland: 1941, c. 44, s. 1(f): High Point: 1941, c. 174

Cross References. — For earlier statute governing foreclosure of tax liens, see § 105-414. For an apparent discrepancy in the time allowed to issue alias summonses under subsection (e) of this section, see § 1-95

Editor's Note. — The 1945 amendment added "summons" to the caption of subsection (e) and rewrote the proviso appearing at the end of the first paragraph thereof.

The 1947 amendment substituted "ten days" for "twenty days" in subsections (q) and (r).

For article on summary procedure for foreclosure of taxes, see 22 N. C. Law Rev. 226

Effect of Failure to Allege Collection of Costs and Fees.—In an action by an exclerk of the superior court against a county for the recovery of fees allegedly due such clerk in tax foreclosure suits by the county, the complaint, alleging that all of the tax

suits in question were prosecuted to judgment against the various defendants, without any allegation or admission that in any of the suits the costs or fees were collected and turned over to the county, is demurrable as not stating a cause of action, the county being under no obligation to pay costs and officer's fees in advance, or ever unless collected. Watson v. Lee County, 224 N. C. 508, 31 S. E. (2d) 535 (1944).

The court has authority to reject the bid made at the foreclosure sale of a tax sale certificate and order a resale, even in the absence of exceptions or an increased bid, under the provisions of subsection (r). Bladen County v. Squires, 219 N. C. 649, 14 S. E. (2d) 665 (1941).

Applied in Hinson v. Morgan, 225 N. C.

740, 36 S. E. (2d) 266 (1945).

Cited in McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548 (1943); Apex v. Templeton, 223 N. C. 645, 27 S. E. (2d) 617 (1943).

105-392. Alternative method of foreclosure.—(a) Docketing Taxes as a Judgment.—In lieu of following the procedure set forth in § 105-391, the governing body of any taxing unit may order the collecting official to file, not less than six months or more than two years (four years as to taxes of the principal amount of five dollars or less) following the collector's sale of certificates, with the clerk of superior court a certificate showing the name of the taxpayer listing the real estate on which such taxes are a lien, together with the amount of taxes, interest, penalties and costs which are a lien thereon, the year for which such taxes are due, and a description of such real property sufficient to permit its identification by parol testimony. The clerk of superior court shall enter said certificate in a special book entitled "Tax Judgment Docket for Taxes for the Year" and shall index the same therein in the name of the listing taxpayer: Provided that the clerk of the superior court may enter said certificate in a special continuing book or books entitled "Tax Judgment Docket for taxes for the years beginning" and index the same in the general judgment index in the name of the listing taxpayer or taxpayers. Immediately upon said docketing and indexing, said taxes, interest, penalties and costs shall constitute a valid judgment against said property, with the priority hereinbefore provided for tax liens, which said judgment, except as herein expressly provided, shall have the same force and effect as a duly rendered judgment of the superior court directing sale of said property for the satisfaction of the tax lien, and which judgment shall bear interest at the rate of six per cent per annum. The clerk shall be allowed fifty cents per certificate for such docketing and indexing, payable when such taxes are collected or such property is sold, and shall account for said fees in the same manner as

other fees of his office are accounted for: Provided, that the governing body of any county, if said clerk is on salary, or said clerk, if he is on fees or salary

plus fees, may require such fees to be advanced by the taxing unit.

The collecting official filing said certificate shall, at least two weeks prior to the docketing of said judgment, send a registered letter to the listing taxpayer, at his last known address, stating that the judgment will be docketed and that execution will issue thereon in the manner provided by law. However, receipt of said letter by said listing taxpayer, or receipt of actual notice of the proceeding by said taxpayer or any other interested person, shall not be required for the validity or priority of said judgment or for the validity or priority, as hereinafter provided, of the title acquired by the purchaser at the execution sale. It is hereby expressly declared to be the intention of this section that proceedings brought under it shall be strictly in rem. It is further declared to be the intention of the section to provide a simple and inexpensive method of enforcing payment of taxes necessarily levied, to the knowledge of all, for the requirements of local governments in this State; and to recognize, in authorizing such proceeding, that all those owning interests in real property know, or should know, without special notice thereof, that such property may be seized and sold for failure to pay such lawful taxes.

Nothing in this section shall be construed as a limitation of time on the right to

foreclose a tax lien under § 105-391.

(b) Motion to Set Aside.—At any time prior to issue of execution, any person having an interest in said property may appear and move to set aside said judgment on the ground that the tax has been paid or that the tax lien on which said

judgment is based is invalid.

(c) Issue of Execution.—At any time after six months and before two years from the indexing of said judgment, execution shall be issued at the request of the governing body of the taxing unit, in the same manner as executions are issued upon other judgments of the superior court, and said property shall be sold by the sheriff in the same manner as other property is sold under execution: Provided, that no debtor's exemption shall be allowed; and provided, further, that in lieu of any personal service of notice on the owner of said property, registered mail notice shall be mailed to the listing taxpayer, at his last known address, at least one week prior to the day fixed for said sale. The purchaser at said sale shall acquire title to said property in fee simple, free and clear of all claims, rights, interest and liens except the lien of other taxes and assessments not paid from the purchase price and not included in the judgment: Provided, that if a taxing unit has, by virtue of the taxes included in such a judgment, been made a defendant in a foreclosure action brought under § 105-391, it shall file answer therein and thereafter all proceedings shall be governed by order of court in accordance with the provisions of that section.

(d) Cancellation upon Payment.—Upon payment in full of any judgment docketed under this section, together with interest thereon and costs accrued to the date of payment, it shall be the duty of the collecting official receiving such payment immediately to certify the fact of such payment to the clerk of superior court, who shall thereupon cancel the judgment, the fee for such cancellation to be fifty

cents (50c), which fee shall be included as part of accrued costs.

(e) Consolidation of Liens.—By agreement between the governing bodies, two or more taxing units may consolidate their liens for purposes of docketing judgment, or may have one execution issued for separate judgments, against the same property. In like manner one execution may issue for separate judgments in favor of one or more taxing units against the same property for different years' taxes.

In any advertisement or posted notice of sale under execution the sheriff may (and, at the request of the governing body of the taxing unit, shall) combine the advertisements or notices for properties to be sold under executions, against the

properties of different taxpayers, in favor of the same taxing unit or group of units: Provided, that the property included in each judgment shall be separately described and the name of the listing taxpayers specified in connection with each.

(f) Special Assessments.—Street, sidewalk and other special assessments may be included in any judgment for taxes taken under this section; or such assessments may be included in a separate judgment docketed under this section, which is hereby declared to be made available as a method of foreclosing the lien of such assessments.

(g) Purchase and Resale by Taxing Unit.—Any taxing unit may become a bidder at said sale under execution, and may assign its bid by private sale, for not less than the amount of such bid. Property purchased by any taxing unit may be resold at any time in the manner provided by law for sale of other property of such unit: Provided, a city may resell property to the former owner or other person formerly having an interest therein, at private sale, for not less than the amount of said unit's interest in such property (other than special assessments).

(h) Procedure if Section Declared Unconstitutional.—If any provisions of this section are declared invalid or unconstitutional by a court of competent jurisdiction, all taxing units which have proceeded under this section shall have one year from the date of the filing of such opinion (or, in case of appeal, from the date of the filing of the opinion on appeal) in which to institute foreclosure actions under § 105-391 for all taxes included in judgments taken under this section and for subsequent taxes due or which, but for purchase of such property by the taxing unit, would have become due; and such opinion shall not have the effect of invalidating the tax lien or disturbing the priority thereof. (1939, c. 310, s. 1720; 1945, c. 646.)

Local Modification. — Cumberland: 1941, c. 44, s. 1(g).

Editor's Note.—The 1945 amendment inserted the proviso to the second sentence

of subsection (a).

For article on summary procedure for foreclosure of taxes, see 22 N. C. Law Rev.

§ 105-393. Time for contesting validity of tax foreclosure title.— No action or proceeding shall be brought to contest the validity of any title to real property acquired, by a taxing unit or by a private purchaser, in any tax foreclosure action or proceeding authorized by this subchapter or by other laws of this State in force at the time of acquisition of said title, nor shall any motion to reopen or set aside the judgment in any such tax foreclosure action or proceeding be entertained, after one year from the date on which the deed is recorded: Provided, that in cases of deeds recorded prior to April 3, 1939, such action or proceeding may be brought or motion entertained within one year after said date: Provided, further, that this shall not be construed as enlarging the time within which to bring such action or proceeding or entertain such motion. (1939, c. 310, s. 1721.)

Cited in McIver Park, Inc. v. Brinn, 223 son v. Morgan, 225 N. C. 740, 36 S. E. (2d) N. C. 502, 27 S. E. (2d) 548 (1943); Hin- 266 (1945).

§ 105-394. Facsimile signatures.—In the institution or prosecution of any suits or other proceedings under this subchapter, or in tax foreclosure proceedings under laws heretofore or hereafter in force, and in the giving of any notice preliminary to the institution thereof, it shall be sufficient and a compliance with the law that where any official or attorney required to sign summons, complaints, verifications of pleadings, notices, judgments or other papers, the name of said official or attorney may be affixed to said documents by stamping thereon the facsimile of the signature of said official or attorney with a rubber stamp by any person authorized by said official or attorney so to do; and said documents so stamped shall have the same legal force and effect as if said signature had been written by said official or attorney with his own hand, and all such signatures stamped as aforesaid shall be

conclusively presumed to have been so stamped at the direction of the official or attorney whose signature it purports to be. (1939, c. 310, s. 1722.)

Authority to Render Judgments Not Delegable.—Clerks of the superior courts, under provisions of this section relating to the use and the authorization of the use of facsimile signatures in signing judgments

or other papers in tax foreclosure proceedings, may not delegate to another the authority to render judgments in such proceedings. Eborn v. Ellis, 225 N. C. 386, 35 S. E. (2d) 238 (1945).

105-395. Application of article.—All provisions of this article shall apply to all taxes originally due within fiscal years beginning on or after July first, one thousand nine hundred thirty-nine. With the exception of the provisions of §§ 105-378 to 105-380, the provisions of this article shall also apply to all taxes uncollected on April 3, 1939, originally due within the fiscal year beginning July first, one thousand nine hundred thirty-eight. Sections 105-373 to 105-377. 105-381 to 105-386, 105-390, 105-393, 105-394, and subsections (k) to (v), inclusive, of § 105-391 shall also apply, to the extent that such application does not affect any action already taken or affect private rights already vested on April 3, 1939, to all taxes, due and owing to taxing units on April 3, 1939, originally due within fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, whether such taxes have heretofore been included in tax sales certificates or not, and whether such taxes are included in pending foreclosure actions or not; and § 105-392, and subsections (a) to (j), inclusive, of § 105-391 shall also apply to all taxes, due and owing to taxing units on April 3, 1939, originally due within fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, which have not been included in any tax foreclosure proceedings pending or completed on April 3, 1939: Provided, that with respect to such taxes originally due within the fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, the provisions of said § 105-392, and subsections (a) to (j), inclusive, of § 105-391 shall be in addition to, and not in substitution for, the provisions of laws in force immediately prior to April 3, 1939: Provided, further, that proceedings may be begun under the provisions of §§ 105-391 and 105-392, with respect to such taxes originally due within the fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, at any time after six months and within one year following April 3, 1939 or within a longer period otherwise permitted by the terms of this article.

Except as in this section provided, the collection and foreclosure of taxes originally due within fiscal years beginning on or before July first, one thousand nine hundred thirty-eight, shall be under the provisions of laws in force immediately prior to April 3, 1939, including § 105-414. In all actions which may be brought under the provisions of section eight thousand thirty-seven of the Consolidated Statutes of North Carolina, the general advertisement, or six months' notice, prescribed by said section need not be made; and the failure to make such advertisement in any action heretofore brought under said section is hereby ratified, confirmed and approved, and, despite such failure, such action, with respect to defendants served with process in such action, either by personal service or service by publication, is hereby validated to the same extent as if said advertisement had

been made.

Section 105-414 is hereby preserved in full force and effect as an alternative method for the foreclosure of taxes originally due within fiscal years beginning on or after July first, one thousand nine hundred thirty-eight: Provided, that the provisions of subsections (f) to (v), inclusive, of § 105-391 shall apply in any such foreclosure action brought under said § 105-414.

Nothing in this section or this article shall be construed to require foreclosure of any taxes under the provisions of § 105-392, and subsections (a) to (j). inclusive, of § 105-391, if such taxes have been or by the terms of this section may be included in any action instituted under laws in force immediately prior to April 3, 1939, whether such taxes be included in said action by the original complaint

or by amendment thereto.

To the extent indicated in this section the laws in force immediately prior to April 3, 1939, are hereby preserved in full force and effect, any repeal clauses contained in this article or subchapter to the contrary notwithstanding. (1939, c. 310, s. 1723.)

Cited in McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548 (1943).

ARTICLE 28.

General Provisions.

§ 105-396. Foreign corporations not exempt.—Nothing in this subchapter shall be construed to exempt from taxation at the value prescribed by law any property situated in this State belonging to any foreign corporation, unless the context clearly indicates the intent to grant such exemption. (1939, c. 310, s. 1800.)

As to right of State to tax foreign corporations, see Commissioners v. Old Dominion Steamship Co., 128 N. C. 558, 39 S. E. 18 (1901).

Cited in Madison County v. Catholic Society of Religious, etc., Education, 213 N. C. 204, 195 S. E. 354 (1938).

§ 105-397. General purpose of subchapter.—It is the purpose of this subchapter except as otherwise herein provided to provide the machinery for the listing and valuing of property, and the levy and collection of taxes, for the year one thousand nine hundred thirty-nine, and annually thereafter, and to that end this subchapter shall be liberally construed, subject to the provisions set out in Schedule H, §§ 105-198 to 105-217. (1939, c. 310, s. 1802.)

ARTICLE 29.

Validation of Listings.

§ 105-398. Real property listings validated.—Listings of any real estate not otherwise listed, which have been carried forward on the tax list of any person by the county supervisor of taxation, list taker or assessor, at the same assessed value of said property as it was valued at in the last quadrennial assessment of taxes, unless the value thereof has been changed by the board of county commissioners as provided by law, are hereby validated, and are hereby declared to be legal and valid listings of the same as if listed by the owner or owner's agent or by the chairman of the board of county commissioners or otherwise, as provided by law.

This section shall be retroactive so as to include the period of time from the first day of May, one thousand nine hundred twenty-seven, to and including the

eleventh day of May, one thousand nine hundred thirty-five.

The counties of Alamance, Ashe, Beaufort, Bertie, Brunswick, Cabarrus, Camden, Carteret, Clay, Currituck, Dare, Durham, Greene, Halifax, Harnett, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Macon, Moore, Northampton, Pasquotank, Pitt, Polk, Randolph, Richmond, Robeson, Rowan, Rutherford, Sampson, Surry, Transylvania, Wake, Warren, and Wayne are hereby exempted from the provisions of this section. (1937, c. 259, ss. 1-3.)

Local Modification.—Nash: 1939, c. 298.

SUBCHAPTER III. COLLECTION OF TAXES.

ARTICLE 30.

General Provisions.

- § 105-399. Subchapter to remain in force. The provisions of this subchapter shall continue in force whether or not brought forward in subsequent acts to raise revenue or acts to provide for the assessment and collection of taxes, commonly called "revenue acts" and "machinery acts," unless and until expressly repealed or amended by, or clearly inconsistent with, subsequent legislation; it being the intention of the General Assembly that this subchapter shall be a standing provision for the government of the matters embraced herein, and not to be repealed by implication because omitted in whole or in part from subsequent legislation on the subject of taxation. (Rev., s. 2849; C. S., s. 7972.)
- § 105-400. Application and construction.—The provisions of this subchapter shall apply to all taxes as defined in this chapter, whether State, county, town, city, or other municipal subdivision; and shall be liberally construed in favor of, and in furtherance of, the collection of such taxes. (Rev., s. 2850; C. S., s. 7973.)
- § 105-401. Terms defined.—Unless such construction or definition would be manifestly inconsistent with or repugnant to the context, the words and phrases following, whenever used in this subchapter, shall be construed to include in their meaning the definitions set opposite the same in this section:

1. "Tax," "taxes." Any taxes, special assessments or costs, interest or penalty

imposed upon property or polls.

- 2. "He." Male, female, company, corporation, firm, society, singular or plural number.
- 3. "Real property." Real estate, land, tract, lot—not only the land itself, whether laid out in town or city lots or otherwise with all things therein, but also all buildings, structures, and improvements and other permanent fixtures of whatever kind thereon, and all rights and privileges belonging or in any wise appertaining thereto, and all estates therein.

4. "Sheriff." Every person who is by law authorized to collect taxes, either

State or municipal. (Rev., s. 2851; C. S., s. 7974.)

- § 105-402. Sheriff includes tax collector.—Whenever in this chapter a duty is imposed upon the sheriff of a county of which a tax collector has been or may be appointed, it shall be incumbent upon the tax collector to perform such office instead of the sheriff, and such tax collector shall collect all the taxes, have all the emoluments and be subject to all the penalties as provided in case of sheriffs in this chapter, and it shall be the duty of all persons having tax moneys in hand to account for and settle with such tax collector. (Rev., s. 5263; 1917, c. 234, s. 111; 1919, c. 92, s. 111; C. S., s. 7975.)
- § 105-403. No taxes released.—No board of county commissioners, or council, or board of aldermen or commissioners of any city or town shall have power to release, discharge, remit, or commute any portion of the taxes assessed and levied against any person or property within their respective jurisdictions for any reason whatever; and any tax so discharged, released, remitted, or commuted may be recovered by civil action from the members of any such board at the suit of any citizen of the county, city, or town, as the case may be, and when collected shall be paid to the proper treasurer. Nothing in this section shall be construed to prevent the proper authorities from refunding taxes as provided in this chapter; nor to interfere with the powers of any officers or boards sitting as a board of equalization of taxes; nor construed to exempt any taxpayer or property from liability for taxes released, discharged, remitted, or com-

muted in violation of this section. (1901, c. 558, s. 31; Rev., s. 2854; C. S., s. 7976.)

Local Modification. - Guilford: 1945, c. 324; Mitchell: 1947, c. 855.

Duty of Commissioners to Rescind Order Releasing Tax.-It is not only competent, but the duty of county commissioners to rescind an order improvidently granted to release one from the assessment of a legal tax upon property. Lemly v. Commissioners, 85 N. C. 379 (1881).

Cited in Middleton v. Wilmington, etc., R. Co., 224 N. C. 309, 30 S. E. (2d) 42 (1944).

§ 105-404. Uncollected inheritance taxes remitted after 20 years. —All inheritance taxes levied by the State which remain uncollected twenty vears or more after the death of the person upon whose estate said taxes were levied shall be, and they are hereby remitted. The provisions of this section shall be retroactive from the date of its enactment. (1935, c. 483: 1949, c. 605.)

Editor's Note. - The 1949 amendment

added the second sentence.

§ 105-405. Taxing authorities authorized to release or remit taxes.—The board of county commissioners or city council or board of aldermen or city commissioners, or any other governing body in any city or town, shall have power to release, discharge, remit or commute any portion of the taxes assessed and levied against any person or property within their respective jurisdictions when there has been destruction or partial destruction or any damage to the property assessed for valuation when such destruction, partial destruction or damage occurs between midnight of December thirty-first and midnight of March thirty-first of any year, and when said destruction or partial destruction or damage has been caused by tornado, cyclone, hurricane or other wind or windstorm: Provided, application for release, discharge, remission or commutation is made to the aforesaid governing body within one year of the date of said destruction, partial destruction or damage: Provided further, that in cases of applicants for such relief who have received, or may receive, reimbursements for such damage or destruction from insurance policy contracts or otherwise, or whose property has been restored or rehabilitated, wholly or partially, by the Red Cross or any public welfare agency or organization without full value having been paid therefor by the property owner, such applicant shall, as a condition precedent to the relief herein provided for, list for taxation for the year for which relief is asked the equivalent in value of such reimbursement or restoration or rehabilitation; and provided further, that such governing body shall apply this section uniformly to all persons and property within its jurisdiction. This section shall be retroactive to and including April first, one thousand nine hundred and thirty-six. (1937, c. 15; 1945, c. 635.)

Local Modification.—Durham and city of Durham: 1947, cc. 96, 515; Montgomery the words "April first and midnight of June and municipalities therein: 1947, c. 515.

Editor's Note. — The 1945 amendment substituted the words "December thirty-

thirtieth" formerly appearing before the first proviso.

- § 105-405.1. Governing boards of counties, cities and towns authorized to refund taxes illegally collected.—The board of county commissioners of any county or the governing body of any city or town, upon the passage and recording in the minutes of a proper resolution finding as a fact that any funds received by such municipality were required to be paid through clerical error or by a tax illegally levied and assessed, is authorized and empowered to remit and refund the same upon the taxpayer making demand in writing to the proper board for such remission and refund within two years from the date the same was due to be paid. (1943, c. 709.)
- § 105-406. Remedy of taxpayer for unauthorized tax.—Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or as-

sessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for the nonpayment thereof; nor shall any court issue any order in claim and delivery proceedings or otherwise for the taking of any personalty levied on by the sheriff to enforce payment of such tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff: but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the State or of the county, city, or town, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city, or town for the amount so demanded, including in his action against the county both State and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of State taxes for which judgment shall be rendered in such action shall be refunded by the State Treasurer. (1901, c. 558, s. 30; Rev., s. 2855; C. S., s. 7979.)

Cross Reference. — For later statute as to suits for recovery of taxes paid under protest, see § 105-267.

Editor's Note.—See 12 N. C. Law Rev.

This section is constitutional. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865 (1891).

Adequate Remedy at Law.—Under this section the taxpayer has an adequate remedy at law by first paying the tax and then suing to recover it. Henrietta Mills v. Rutherford County, 281 U. S. 121, 50 S. Ct. 270, 74 L. Ed. 737 (1930).

Exclusiveness of Statutory Remedy.—
The taxpayer is restricted to the remedy provided by the statute, and, in order to avail himself of it, he must comply with all the requirements thereof. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865 (1891); Wilson v. Green, 135 N. C. 343, 47 S. E. 469 (1904). Assumpsit for money had and received does not lie to recover improperly listed taxables. Huggins v. Hinson, 61 N. C. 126 (1867).

Quo warranto is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax even though it is levied under the authority of a popular election. Barbee v. Board of Com'rs, 210 N. C. 717, 188 S. E. 314 (1936).

Where a corporation, under Laws 1925, c. 102, submitted its report to the State Board of Assessment, and the Board in accordance with the statute certified to the register of deeds of the county where the property was situated the corporate excess liable for local taxation, the exclusive rem-

edy of the corporation if dissatisfied with the report of the Board was to file exceptions with the Board in accordance with the statute, with the right of appeal from the Board upon a hearing by it, and the corporation could not pay the tax under protest and seek to recover it under the provisions of this section. Manufacturing Co. v. Commissioners of Pender, 196 N. C. 744, 147 S. E. 284 (1929).

Where a town ordinance imposes a license tax upon those selling at wholesale or peddling therein, and provides that its violation be punishable as a misdemeanor, the remedy to test the validity of the ordinance is to pay the tax under protest and bring action to recover it back, in accordance with this section, and equity will not enjoin the town from executing its threat to arrest for violations of the ordinance, it not appearing that the plaintiff would be irreparably damaged by the payment of the tax, and the legal remedy to recover the tax affording adequate relief. Loose-Wiles Biscuit Co. v. Sanford, 200 N. C. 467, 157 S. E. 432 (1931).

A compliance with this section is a prerequisite to a right of action for the recovery of taxes or any part thereof. Taxes paid voluntarily and without objection or compulsion cannot be recovered, even though the tax be levied unlawfully. Middleton v. Wilmington, etc., R. Co., 224 N. C. 309, 30 S. E. (2d) 42 (1944).

Payment under Protest.—Where the owner resists the payment of taxes as unlawful, he is required to pay them under his protest and sue to recover them. Carstar-

phen v. Plymouth, 168 N. C. 90, 118 S. E. 905 (1914); Galloway v. Board of Education, 184 N. C. 245, 114 S. E. 165 (1922). See also, State v. Snipes, 161 N. C. 242, 76 S. E. 243 (1912).

To test the legality of a tax imposed, the taxpayer should pay the same and sue to recover it in accordance with the provisions of this section. Southeastern Express Co. v. Charlotte, 186 N. C. 668, 120 S. E. 475 (1923).

Written Demand for Refund.—The General Assembly, as far back as 1887, enacted that demand for the return of taxes must be made within thirty days after payment, and it was held in Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865 (1891), and Teeter v. Wallace, 138 N. C. 264, 50 S. E. 701 (1905), that the statute applied to all taxes, that the remedy provided was exclusive, and that a failure to make demand within the time prescribed was fatal to the right to maintain an action to recover the tax. Blackwell v. Gastonia, 181 N. C. 378, 107 S. E. 218 (1921).

The requirement of making a demand within the prescribed time is mandatory. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865 (1891). It must also be made in writing. Bristol v. Morganton, 125 N. C. 365, 34 S. E. 512 (1899).

The requirement of demand is not confined to claim for refunding any particular taxes or taxes alleged to be invalid on any particular account. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865 (1891).

Same—Right to Sue.—Upon the failure of the county treasurer to refund within 90 days, the person so paying the tax may maintain an action against the county, including in his demand both the State and county taxes. Brunswick-Balke Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317 (1921).

Same—Further Demand under § 153-64 Unnecessary. — When the party has complied with the condition of this section he has a present right of action for the recovery of the tax without the necessity of having made the presentation and demands to the proper municipal authorities referred to in § 153-64. Southern R. Co. v. Cherokee County, 177 N. C. 86, 97 S. E. 758 (1919); Atlantic Coast Line R. Co. v. Brunswick County, 178 N. C. 254, 100 S. E. 428 (1919).

Same—Alleging Demand.—A complaint which fails to allege that the demand was made within thirty days is insufficient on demurrer. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865 (1891). See Hunt

v. Cooper, 194 N. C. 265, 139 S. E. 446 (1927).

When Injunction Will Lie. — Injunction is the appropriate relief to prevent the collection of an illegal and invalid tax. This constitutes the exception in the statute and gives the taxpayer an additional remedy (see Purnell v. Page, 133 N. C. 125, 45 S. E. 534 (1903)) to test the validity of a tax, Range Co. v. Carver, 118 N. C. 328, 24 S. E. 352 (1896), but only the collection of the tax will be enjoined, until the merits of the controversy can be determined. North Carolina Railroad Co. v. Commr's, 82 N. C. 260 (1880).

An injunction will lie to restrain the collection of taxes and to restrain the sale of property under distraint, for three reasons, to wit: (1) If the taxes or any part thereof be assessed for an illegal or unauthorized purpose. (2) If the tax itself be illegal or invalid. (3) If the assessment of the tax be illegal or invalid. Purnell v. Page, 133 N. C. 125, 45 S. E. 534 (1903); Sherrod v. Dawson, 154 N. C. 525, 70 S. E. 739 (1911).

Same—Failure to Give Taxpayer Notice.
—An injunction will be granted to the hearing against the sheriff for collecting back taxes on a solvent credit, upon the ground that the plaintiff was not given notice of the assessment or opportunity to be heard before the board of assessors or the tribunal having the power to list or assess such property. Lumber Co. v. Smith, 146 N. C. 199, 59 S. E. 653 (1907).

Same—Special Assessment for Improvements.—Where an owner of a town lot resists payment of an assessment of his property for the cost of paving or laying down a sidewalk on the ground of excessive cost, discrimination, or for other causes, the remedy of injunction is an improper one, for the owner should pay, under protest, the assessment levied and bring his action to recover it or the excess over a proper charge. Marion v. Pilot Mountain, 170 N. C. 118, 87 S. E. 53 (1915).

Same—Levy for School Purposes.—Injunctive relief is not available to the tax-payers of a county, where a tax levy for school purposes has been made, when it appears that under the levy complained of the moneys have been raised and distributed to the branches of government entitled thereto, some of which are not parties to the suit. Semble, the only remedy for the injured taxpayers is to pay the illegal tax under protest and sue to recover the same, as provided by statute. Galloway v. Board, 184 N. C. 245, 114 S. E. 165 (1922).

Parties to Suit for Injunction. — The sheriff is the proper party defendant to a

suit to enjoin the collection of taxes, but the commissioners may make themselves parties if they think the rights of the county require it. Lumber Co. v. Smith, 146 N. C. 199, 59 S. E. 653 (1907).

Necessary Allegations.—In order to enjoin the collection of taxes on land, it is necessary to allege that the taxes sought to be recovered were illegally imposed or unlawfully collected. Hunt v. Cooper, 194 N.

C. 265, 139 S. E. 446 (1927).

Burden on Taxpayer.—Where a taxpayer seeks equitable relief against the alleged unlawful assessment of taxes against its property by the county authorities, it must allege and show that the amount claimed as excessive was in fact an excessive valuation. Norfolk-Southern R. Co. v. Board, 188 N. C. 265, 124 S. E. 560 (1924).

Injunction Granted. — For a case in which injunctive relief against the collection of taxes was granted, see Barber v. Benson, 200 N. C. 683, 158 S. E. 245 (1931).

Portion of Levy Enjoined.—The courts will not enjoin the collection of an entire levy of taxes if the portion conceded to be valid can be separated from the portion alleged to be unconstitutional. Railroad v. Commissioners, 148 N. C. 220, 61 S. E. 690 (1908).

Applied in Hilton v. Harris, 207 N. C. 465, 177 S. E. 411 (1934); Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948); Henderson v. Gill, 229 N. C. 313,

49 S. E. (2d) 754 (1948).

Cited in Seaboard Air Line Railway Co. v. Brunswick County, 191 N. C. 550, 152 S. E. 627 (1926); Bottling Co. v. Doughton, 196 N. C. 791, 147 S. E. 289 (1929); Nantahala Power, etc., Co. v. Clay County, 213 N. C. 698, 197 S. E. 603 (1938); Weinstein v. Raleigh, 219 N. C. 643, 14 S. E. (2d) 661 (1941); Newton v. Chason, 225 N. C. 204, 34 S. E. (2d) 70 (1945); Henrietta Mills v. Rutherford County, 32 F. (2d) 570 (1929).

§ 105-407. Refund of taxes illegally collected and paid into State treasury.—Whenever taxes of any kind are or have been through clerical error, or misinterpretation of the law, or otherwise, collected and paid into the State treasury in excess of the amount legally due the State, the State Auditor shall issue his warrant for the amount so illegally collected, to the person entitled thereto, upon certificate of the head of the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the Attorney General, and the Treasurer shall pay the same out of any funds in the treasury not otherwise appropriated: Provided, demand is made for the correction of such error or errors within two years from the time of such payment. (Ex. Sess. 1921, c. 96; C. S., s. 7979(a).)

Cross References.—As to refund of overpayment with interest, see § 105-266. As to suits for recovery of taxes paid under

protest, see § 105-267.

The difference between this section and § 105-267 is this: When a refund is ordered under this section, simply upon demand and notice by the taxpayer, no interest is allowed, but when the demand for a refund is denied, and the taxpayer is required to bring suit, and recovers, it is provided that "judgment shall be rendered therefor, with interest." This is a reasonable difference

between the two statutes. Cannon v. Maxwell, 205 N. C. 420, 171 S. E. 624 (1933).
Where the Commissioner of Revenue,

Where the Commissioner of Revenue, with the approval of the Attorney General, orders a refund of taxes paid under protest in accordance with this section, merely upon demand and notice of the taxpayer, no suit having been brought to recover the taxes, the taxpayer is not entitled to interest on the amount refunded. Cannon v. Maxwell, 205 N. C. 420, 171 S. E. 624 (1933). See § 105-266, providing for refund of overpayment with interest.

ARTICLE 31.

Rights of Parties Adjusted.

§ 105-408. Taxes paid in judicial sales and sales under powers.— In all civil actions and special proceedings wherein the sale of any real estate shall be ordered, the judgment shall provide for the payment of all taxes then assessed upon the property and remaining unpaid, and for the payment of such sums as may be required to redeem the property, if it has been sold for taxes and such redemption can be had; all of which payments shall be adjudged to be made out of the proceeds of sale. The judgment shall adjust the disbursements for such taxes and expenses of redemption from tax sales between the parties

to the action or proceeding in accordance with their respective rights. And whenever any real estate shall be sold by any person under any power of sale conferred upon him by any deed, will, power of attorney, mortgage, deed of trust, or assignment for the benefit of creditors, the person making such sale must pay out of the proceeds of sale all taxes then assessed upon such real estate and such sums as shall be necessary to redeem the land, if it has been sold for taxes and such redemption is practicable. This section shall apply both to taxes and special assessments for paving, drainage, or other improvements; provided, that the person making such sale, whether under order of court or in the exercise of a power, shall be required, in cases where special assessments are payable in installments, to pay only such installments of special assessments as have become due at the date of such sale. The failure to comply with this section and pay such taxes or assessments shall not vacate or affect the lien of such taxes or assessments, but such lien shall be discharged only to the extent payment is actually made. (1901, c. 558, s. 47; Rev., s. 2857; C. S., s. 7980; 1929, c. 231, s. 1.)

Cross Reference. - As to lien of mortgagee who pays taxes, see § 105-409 and note thereto.

Editor's Note. - The 1929 amendment added the last two sentences of this section.

Purpose of Section. - The object of the law embraced in this and § 105-409 is not only to preserve the property for the benefit of all interested parties, but to pass a clear title to the purchaser when it is sold. This being the true purpose, an order directing a commissioner to pay "all such taxes and assessments as are and have been levied" thereon is valid. Smith v. Miller, 158 N. C. 98, 73 S. E. 118 (1911).

This section creates an alternative remedy in behalf of the tax agency, and it may look to the trustee or mortgagee for the payment required by this section or it may waive that remedy and resort to a foreclosure of the tax lien. New Hanover County v. Sidbury, 225 N. C. 679, 36 S. E. (2d) 242 (1945).

The rule that taxes assessed at the death of decedent come within the third class for payment (§ 28-105) is not affected by the provisions of this section, requiring that taxes assessed against the property should be paid from the proceeds of foreclosure sale. Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 171 S. E. 368 (1933).

Foreclosure of Mortgage,-Land sold on the foreclosure of a mortgage is liable for taxes assessed after the execution of the mortgage. Wooten v. Sugg, 114 N. C. 295, 19 S. E. 148 (1894).

Same—Respective Duty of Mortgagor and Mortgagee.-It is the duty of the mortgagor in possession to list the land for taxation and to pay to the proper officer the tax levied on it for each year, and it is incumbent on the mortgagee, the owner of the legal title, to see to it that this is done. Wooten v. Sugg, 114 N. C. 295, 19 S. E. 148 (1894). Section 105-409 provides a method whereby he may pay such taxes without loss to himself, and he should take advantage of this privilege to save his security, where the mortgagor fails to discharge the lien. Exum v. Baker, 115 N. C. 242, 20 S. E. 448 (1894).

As was decided in Powell & Co. v. Sikes, 119 N. C. 231, 26 S. E. 38 (1896), the mortgagee's lien is subject to the lien for taxes, and he must pay them if the mortgagor does not, and he is barred by a sale of the land for taxes without notice from the sheriff. Insurance Co. v. Day, 127 N. C. 133, 37 S. E. 158 (1900).

Applied in Guilford County v. Estates Administration, 213 N. C. 763, 197 S. E. 535 (1938).

105-409. Tax paid by holder of lien; remedy.—Any person having a lien or encumbrance of any kind upon real estate may pay the taxes due by the owner thereof in so far as the same are a lien upon such real estate, and the amount of taxes so paid shall, from the time of payment, operate as a lien upon such real estate in preference to all other liens, which lien may be enforced by action in the superior court in term. The money so paid may also be recovered by action for moneys paid to his use against the person legally liable for the payment of such taxes. (1879, c. 71, s. 55; Code, s. 3700; 1901, c. 558, s. 46; Rev., s. 2858; C. S., s. 7981.)

Lien of Mortgagee. - Money paid by a land. But his purchase of the tax title does

not deprive the mortgagor of his equity of mortgagee to acquire a tax title on the redemption. Cauley v. Sutton, 150 N. C. mortgaged lands becomes a lien on the 327, 64 S. E. 3 (1909). As to duty of mortgagee to pay taxes, see Wooten v.

Sugg, 114 N. C. 295, 19 S. E. 148 (1894). And see note to § 105-408. Cited in King v. Lewis, 221 N. C. 315, 20 S. E. (2d) 305 (1942).

§ 105-410. Forfeiture by life tenant failing to pay.—Every person shall be liable for the taxes assessed or charged upon the property or estate, real or personal, of which he is tenant for life. If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner. The remainderman or reversioner may redeem such lands, in the same manner that is provided for the redemption of other lands. Moreover, such remainderman or reversioner shall have the right to recover of such tenant for life all damages sustained by reason of such neglect or refusal on the part of such tenant for life. If any tenant for life of personal property suffer the same to be sold for taxes by reason of any default of his, he shall be liable in damages to the remainderman or reversioner. (1879, c. 71, ss. 53, 54; Code, ss. 3698, 3699; 1901, c. 558, s. 45; Rev., s. 2859; C. S., s. 7982.)

Later Enactment Affecting Section.—In considering this section and the cases construing it, the changes made in the tax foreclosure laws by Public Laws 1939, c. 310, should be borne in mind. See §§ 105-387 to 105-393 and Crandall v. Clemmons, 222 N. C. 225, 22 S. E. (2d) 448 (1942), treated below. See also the dissenting opinion of Justice Seawell in Cooper v. Cooper, 220 N. C. 490, 17 S. E. (2d) 655 (1941). With the exception of the Crandall case, all of the cases in the following note were decided under the former law.

Life Estate No Longer Forfeited. - The power to sell real estate for taxes was repealed by c. 310, Laws 1939, s. 1715 et seq. (§ 105-387 et seq.). The sheriff or tax collector is limited to the sale of the tax lien. The lien can be enforced only by an action in the superior court, in the county in which the land is situated, in the nature of an action to foreclose a mortgage. The interest of the life tenant, as well as that of all other interested parties, including lienholders, can be divested only at the final tax sale, authorized by a judgment entered in a tax foreclosure suit in which they were made parties and duly served with process. Under our present tax foreclosure laws, life estates are no longer forfeited under the provisions of this section. Crandall v. Clemmons, 222 N. C. 225, 22 S. E. (2d) 448 (1942).

Purpose of Section. — The fact that the remainderman is given the right of forfeiture and redemption under this section in case the life tenant suffer the land to be sold for taxes, is in recognition of the duty resting upon the life tenant to keep the property free from tax liens, so that it may pass to the remainderman unencumbered by such liens. Rigsbee v. Brogden, 209 N. C. 510, 184 S. E. 24 (1936).

Forfeiture Occurs before Tax-Sale Cer-

tificate Is Foreclosed.—By the express terms of this section, a life tenant forfeits his interest in lands to the remaindermen when he fails and refuses to pay taxes thereon and suffers the land to be sold for taxes and fails to redeem same within one year from such sale, and the contention that the estate of the life tenant is not forfeited until the taxele certificate is foreclosed and the land sold by a commissioner is untenable. Sibley v. Townsend, 206 N. C. 648, 175 S. E. 107 (1934).

When Remainderman May Exercise Right.—In Smith v. Miller, 158 N. C. 98, 73 S. E. 118 (1911), the court raises the question whether or not the remainderman or reversioner, in operating under this section, must wait until there is a sale and the accumulation of costs and expenses, before he can exercise his right to redeem. The court says that the evident purpose of this section is that if the life tenant does not pay, and thereby exposes the land to sale, he may intervene and prevent a sale by paying the tax.

It is not required that a remainderman should settle for the taxes against the property before bringing action against the life tenant under this section, to have her estate forfeited for allowing the property to be sold for taxes and failing to redeem same within the time prescribed by law. Bryan v. Bryan, 206 N. C. 464, 174 S. E. 269 (1934).

Payment after Suit Instituted Does Not Affect Forfeiture.—Where a life tenant has permitted the lands to be sold for non-payment of taxes and has failed to redeem same within one year of sale, the remaindermen are entitled to have the life estate declared forfeited in their suit thereafter instituted and the fact that after the institution of the suit the life tenant pays the

taxes, interests and penalties, does not affect the forfeiture. Cooper v. Cooper, 220 N. C. 490, 17 S. E. (2d) 655 (1941).

Nor Does Insufficient Description on Tax List.—A life tenant who has forfeited her estate by failing to redeem the land within one year after sale of the tax lien by the sheriff cannot be permitted to avoid the forfeiture on the ground of the insufficiency of the description of the property on the tax list, since she herself listed the property for taxation and could not have been misled by an alleged insufficiency in the description. Cooper v. Cooper, 221 N. C. 124, 19 S. E. (2d) 237 (1942).

Taxes Constitute Claim against Life Tenant's Estate.—A life tenant is liable for taxes assessed against the property during his lifetime, and when he dies without paying the same they constitute a claim against his estate for taxes assessed previous to his death within the meaning of § 28-105, and

are payable in the third class stipulated by that section. Rigsbee v. Brogden, 209 N. C. 510, 184 S. E. 24 (1936).

Set-Off.—Where a life tenant, whose estate has been forfeited for failure to pay taxes on the property, has a judgment for debt against the remaindermen, the remaindermen may be allowed to offset the unpaid taxes against the judgment. Meadows v. Meadows, 216 N. C. 413, 5 S. E. (2d) 128 (1939).

A widow who has a homestead allotted her in the lands of her deceased husband in lieu of dower is a tenant for life thereof, within the meaning of this section. Tucker v. Tucker, 180 N. C. 235, 13 S. E. 5 (1920).

Interest Passing under Prior Law. — See Smith v. Proctor, 139 N. C. 314, 51 S. E. 889 (1905).

Cited in Hutchins v. Mangum, 198 N. C. 774, 153 S. E. 409 (1930).

§ 105-411. Remedies of cotenants and joint owners.—Any one of several tenants in common, or joint tenants or copartners shall have the right to pay his share of the taxes assessed or due upon the real estate held jointly or in common, or, if such estate has been sold for taxes, he may redeem his share by paying his proportionate part of the amount required for redeeming the whole. Where he has paid his share of the taxes or amount required for the redemption and the land has been or shall be divided by actual partition the share set apart to him in severalty shall be free from the lien of, and shall not be liable to be subjected in any manner to, the payment of the residue of taxes assessed upon such property; but such residue of taxes and the costs and penalties incident thereto shall be a lien upon the residue of such real estate, which residue shall be subjected to the satisfaction thereof; and when he has paid his share of the taxes, or amount necessary to redeem, and the real estate is sold under judicial proceedings for partition, his share of the proceeds shall not be diminished by disbursements for the residue of such taxes or for redeeming the property, and the costs and penalties incident thereto. Any such part owner in real estate shall have the right to pay the whole of the taxes assessed thereon and all costs and penalties incident to such taxes, and to redeem such real estate as a whole when it has been sold for taxes, and all sums by him so paid in excess of his share of such taxes, costs, and penalties and amounts required for redemption, shall constitute a lien upon the shares of his cotenants or associates, payment whereof, with interest, he may enforce in proceedings for partition, actual or by sale, or in any other appropriate judicial proceeding. When one tenant in common, joint tenant, or copartner shall have paid his proportionate part of the taxes, as allowed by this section, before a sale for taxes, the sheriff shall except his undivided interest from the sale and in the certificate of sale and deed for the property. (1901, c. 558, ss. 13, 14, 47; Rev., s. 2860; C. S., s. 7983.)

Payment by One Tenant in Common.—One tenant in common may pay his or her part of the tax and let the other share go, and three years' possession by the purchaser under the tax deed bars the former rightful owner, under G. S. § 1-52, subsection 10. Ruark v. Harper, 178 N. C. 249, 100 S. E. 584 (1919).

Petitioners in a proceeding for sale of

land for partition may not object to the allowance of a sum advanced by one of the parties to pay taxes on the property, as provided by this section, when there is no exception or appeal entered of record by the testator's administrator. Everton v. Rodgers, 206 N. C. 115, 173 S. E. 48 (1934).

Where One Tenant in Possession.—This section refers to cases where all the tenants

are on the same footing, all or none being in possession. It does not authorize one tenant in common to take title for the whole tract, nor does it apply to a case where one tenant was in possession for all. Smith v. Smith, 150 N. C. 81, 63 S. E. 177 (1908).

§ 105-412. Fiduciaries to pay taxes.—It shall be the duty of every guardian, executor, administrator with the will annexed, agent, trustee, receiver, or other fiduciary in whose care or control any property or estate, real or personal, may be, to pay the taxes thereon out of the trust funds in his hands, if any there be; and if he fail so to do he shall become personally liable for such taxes, and such liability may be enforced by an action against him in the name of the sheriff. If he permit such property to be sold by reason of his negligence to pay the taxes when he has funds in hand, he shall be liable to his ward, principal, or cestui que trust for all actual damages incident to such neglect. This section shall not have the effect of relieving the estates held in trust or under the control of fiduciaries from the lien of such taxes. (1762, c. 69, s. 14; R. C., c. 54, s. 27; 1868-9, c. 201, s. 32; 1879, c. 71, s. 53; Code, ss. 1595, 3698; Rev., s. 2862; C. S., s. 7985.)

Order Directing Payment of Taxes.—An order directing the trustee to pay taxes on a house and lot and to keep same in repair, even though the comparatively small amount necessary therefor would be at the expense of the beneficiaries under the residuary trust, is proper, such construction of the will being necessary to effectivate the primary purpose of testator to provide a home for life for his aged and

crippled employee. Latta v. McCorkle, 213 N. C. 508, 196 S. E. 867 (1938).

Applied in Sherrod v. Dawson, 154 N. C.

525, 70 S. E. 739 (1911).

Cited in Gross v. Craven, 120 N. C. 331, 26 S. E. 940 (1897); Headman v. Commissioners, 177 N. C. 261, 98 S. E. 776 (1919); Coltrane v. Donnell, 203 N. C. 515, 166 S. E. 397 (1932); Hood v. McGill, 206 N. C. 83, 173 S. E. 20 (1934).

ARTICLE 32.

Tax Liens.

§ 105-413. Tax lien on railroad property.—The taxes upon any and all railroads in this State, including roadbed, right of way, depots, sidetracks, ties and rails, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereupon, commencing from the first day of May in each current year, against all claims or demands whatsoever of all persons or bodies corporate, except the United States and this State; and the above described property or any part thereof may be taken and held for payment of all taxes assessed against such railroad company in the several counties in this State. (Rev., ss. 2865, 5296; 1917, c. 234, s. 98; 1919, c. 92, s. 98; C. S., s. 7989.)

§ 105-414. Tax lien enforced by action to foreclose.— A lien upon real estate for taxes or assessments due thereon may be enforced by an action in the nature of an action to foreclose a mortgage, in which action the court shall order a sale of such real estate, or so much thereof as shall be necessary for that purpose, for the satisfaction of the amount adjudged to be due on such lien, together with interest, penalties, and costs allowed by law, and the costs of such action. When such lien is in favor of the State or county, or both, such action shall be prosecuted by and in the name of the county; when the lien is in favor of any other municipal corporation the action shall be prosecuted by and in the name of such corporation. When such lien is in favor of any private individual or private corporation holding a certificate of tax sale or deed under a tax sale, whether as original purchaser at a tax sale or as assignee of the county or other municipal corporation or of any other holder thereof, such action shall be prosecuted in the name of the real party in interest. (1901, c. 558, §§ 42, 43; Rev., s. 2866; C. S., s. 7990.)

Local Modification.—Wayne: Pub. Loc. 1939, c. 190.

Cross Reference. — For subsequent stat-

ute governing foreclosure of tax lien, see § 105-391.

Editor's Note.—For article on summary

procedure for foreclosure of taxes, see 22 N. C. Law Rev. 226.

Prescribed Remedy Optional with State.—The fact that the Revenue Act prescribes a specific remedy for the collection of taxes does not restrict the State to pursue that method, nor preclude it from seeking the aid of the superior court through a creditor's suit. The specific remedy pointed out restricts only the officers who collect only the revenue and not the sovereign. State v. Georgia Co., 112 N. C. 34, 17 S. E. 10 (1893).

Summary Proceeding Unnecessary.—Where the legislature has authorized a municipality to collect back taxes, and in an action for that purpose it appears that the taxes of the defendant are due, and were properly assessed against lots of land within the limits of the municipality subject to the lien therefor, it is not necessary that the plaintiff should first have resorted to the summary method of levy and sale, for recourse may be had directly by suit to foreclose the lien, under this section. Wilmington v. Moore, 170 N. C. 52, 86 S. E. 775 (1915); Commission v. Epley, 190 N. C. 672, 130 S. E. 497 (1925).

Tax Collector Has No Lien Where Check Returned Unpaid.—The fact that a county tax collector accepted a check in payment for taxes, and the check was returned unpaid, and the collector in his settlement with the county paid the taxes in question, does not give him a lien which may be enforced under this section. The collector having failed to correct the tax record so as to show the check returned and the taxes unpaid, the tax lien was not reinstated. Miller v. Neal, 222 N. C. 540, 23 S. E. (2d) 852 (1943).

The receiver of a drainage district may proceed in an action in the nature of an action to foreclose a mortgage under this section for the collection of such drainage assessments. Nesbit v. Kafer, 222 N. C. 48, 21 S. E. (2d) 903 (1942).

Statute of Limitations.—The cases under this catchline were decided prior to the 1947 amendment to § 105-422.

The action provided by this section is as one upon a judgment to foreclose a lien and is not barred within ten years. The statute providing that an action on a liability created by statute shall be brought within three years has no application. Drainage District v. Huffstetler, 173 N. C. 523, 92 S. E. 368 (1917). This is on the well settled principle that statutes of limitation, even if applicable to a given case, do not apply to the sovereign unless it is expressly named therein. New Hanover

County v. Whiteman, 190 N. C. 332, 129 S. E. 808 (1925). See also, Charlotte v. Kavanaugh, 221 N. C. 259, 20 S. E. (2d) 97 (1942).

Whether the lien be a plain lien arising from the bare purchase at the sale or payment of taxes or such as may be evidenced by a certificate of sale executed by the proper officers, the sovereign may proceed under this section to foreclose the lien, in which event no statute of limitations is applicable. Logan v. Griffith, 205 N. C. 580, 172 S. E. 348 (1934).

In view of the fact that this section contains no limitation of action, the maxim that time does not bar the sovereign still subsists as the law in this State, at least in respect to collection of taxes. Miller v. McConnell, 226 N. C. 28, 36 S. E. (2d) 722 (1946).

Same — Action to Foreclose Lien for Public Improvements.—In a suit under this section, to foreclose a statutory lien on abutting property given a city for street improvements, all installments of the amounts assessed therefor which are ten years overdue when action is brought are barred by the statute of limitations under § 160-93, and no part of the proceeds of sale can be applied to the payment of such installments. Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 26 S. E. (2d) 573 (1943). See § 105-422.

An action to enforce the lien for public improvements, even though instituted under this section, is barred after ten years from default in the payment of the assessments, or, if the assessments are payable in installments, each installment is barred after ten years from default in payment of same unless the time for payment has been extended as provided by law. Charlotte v. Kavanaugh, 221 N. C. 259, 20 S. E. (2d) 97 (1942), distinguishing Asheboro v. Morris, 212 N. C. 331, 193 S. E. 424 (1937).

Where a municipality elects to enforce a lien against land for paving assessments by action under this section, no statute of limitations is applicable, and the pleadings in this action are held sufficient to bring the action within the procedure under this statute. Asheboro v. Morris, 212 N. C. 331, 193 S. E. 424 (1937). But see Charlotte v. Kavanaugh, 221 N. C. 259, 20 S. E. (2d) 97 (1942); Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 26 S. E. (2d) 573 (1943).

Where tax liens for certain years have been barred by another statute, this section does not afford a remedy. Raleigh v. Jordan, 218 N. C. 55, 9 S. E. (2d) 507 (1940), decided under the former wording of § 105-

422, which destroyed tax liens for 1926 and prior years.

The notice must correctly name or describe the parties defendant served by the publication in order for the court to acquire jurisdiction. Board of Com'rs v. Gaines, 221 N. C. 324, 20 S. E. (2d) 377 (1942).

Alias Summons.—In an action to enforce a lien for public improvements it was held that the allegations constituted the action one to foreclose the original lien under this section, notwithstanding that a purported alias summons was issued 91 days after the institution of the action, as permitted in an action instituted under repealed C. S. § 8037, since the nature of an action is determined by the allegations of the complaint and not by the time the purported alias summons was issued. Asheboro v. Miller, 220 N. C. 298, 17 S. E. (2d) 105 (1941).

Class Representation of Contingent Remainderman.—In an action under this section to enforce the lien for taxes against lands affected by a contingent limitation over, in which each class of contingent remaindermen is represented by defendants actually served and answering, the judgment is binding upon all contingent remaindermen by class representation. Rodman v. Norman, 221 N. C. 320, 20 S. E. (2d) 294 (1942).

Consolidation of Actions.—Where actions are pending in the same court, at the same time, between the same parties and involving substantially the same facts, they may be consolidated. This principle applies to tax foreclosure suits. McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548 (1943).

Taxes Not Subject to Set-Off or Counterclaim.—Taxes are not debts in the ordinary sense of the word and they do not rest upon contract or consent of the tax-payer. Pleas of set-off and counterclaim are not allowed because to do so would delay the collection and payment of taxes, and would deprive the government of means of performing its functions. Graded School v. McDowell, 157 N. C. 316, 72 S. E. 1083 (1911); Commissioners v. Hall, 177 N. C. 490, 99 S. E. 372 (1919).

In a suit by a town against defendants to foreclose a tax lien under this section, where defendants set up defense by answer and also a counterclaim, motion to strike the counterclaim and order thereon was proper, but the other defenses were unaffected thereby. Apex v. Templeton, 223 N. C. 645, 27 S. E. (2d) 617 (1943).

Taxes Due after Commencement of Action.—Where a county brings suit to foreclose a tax lien on the lands of the taxpayer

and draws its complaint according to the provisions of this section, other taxes due after the commencement of the action are properly included in the judgment therein rendered in its favor. New Hanover County v. Whiteman, 190 N. C. 332, 129 S. E. 808 (1925).

Amount of Interest Recoverable. — Since no rate of interest is fixed by the section, only six per cent interest can be recovered. Wilmington v. State, 122 N. C. 395, 30 S. E. 12 (1898).

Judgment in Foreclosure Suit Is Lien in Rem.—In an action to foreclose a lien for delinquent taxes or special assessments, the judgment obtained in said action constitutes a lien in rem and the owner of the property is not personally liable for the payment thereof. Apex v. Templeton, 223 N. C. 645, 27 S. E. (2d) 617 (1943).

Order of Foreclosure Restricted to Land Described in Complaint.—In an action under this section, where complaint describes the real estate sought to be foreclosed to enforce the tax lien, the order of foreclosure is restricted to the described parcels, and so much of the judgment as authorizes the sale of other lands is in excess of the jurisdiction of the court. Miller v. McConnell, 226 N. C. 28, 36 S. E. (2d) 722 (1946).

Inadequacy of Price in Foreclosure Action.—In an action to foreclose a tax lien on land, the mere inadequacy of the price bid therefor is not sufficient to avoid the sale and cancel the deed to the purchaser, unless some element of fraud, suppression of bidding, or other unfairness in the sale appears. Duplin County v. Ezzell, 223 N. C. 531, 27 S. E. (2d) 448 (1943).

Ample Opportunity Given to Redeem.—Where the judgment of foreclosure in a tax suit authorized a sale, in default of payment of all taxes, etc., on or before sixty days from the date of the judgment, and the original sale was held within sixty days of such date, and after two resales, the last of which was held more than three months after the date of the judgment, the sale was finally consummated, there was ample opportunity to redeem, and sale and confirmation were valid. McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548 (1943).

Where Clerk's Order Confirming Sale and Decreeing Execution of Deed Is Void.

—Where, in the foreclosure of the tax liens upon lands under this section, the clerk's order confirming the commissioner's sale and decreeing that he execute deed was void because entered on a day other than Monday, the owners were entitled to re-

deem the land from the tax sale upon tender, and such tender having been made two days prior to the effective date of c. 107, Laws 1939, amending § 1-209 and relating to the clerk's power to enter certain judgments in actions instituted under this section and ratifying judgments and orders theretofore entered by clerks of superior courts in such actions, the effect of this latter statute need not be considered, and the sale being set aside, the authority of the clerk at that time to enter final judgment

by default ordering sale of the lands need not be determined. Beaufort County v. Bishop, 216 N. C. 211, 4 S. E. (2d) 525 (1939).

Applied in Bladen County v. Breece, 214 N. C. 544, 200 S. E. 13 (1938); Robeson County Drainage Dist. v. Bullard, 229 N. C. 633, 50 S. E. (2d) 742 (1948).

Cited in Wilkinson v. Boomer, 217 N. C. 217, 7 S. E. (2d) 491 (1940); Wadesboro v. Coxe, 218 N. C. 729, 12 S. E. (2d) 223 (1940).

ARTICLE 33.

Time and Manner of Collection.

- § 105-415. Sureties of sheriff may collect, when.—If any sheriff shall die during the time appointed for collecting taxes, his sureties may collect them, and for that purpose shall have all power and means for collecting the same from the collectors and taxpayers as the sheriff would have had, and shall be subject to all the remedies for collecting and settling the taxes, on their bond or otherwise, as might have been had against the sheriff if he had lived. (Rev., ss. 2868, 5264; 1917, c. 234, s. 112; 1919, c. 92, s. 112; C. S., s. 7993.)
- § 105-416. Sheriff collecting by deputy.—When the sheriff shall collect by his deputies they shall, before the clerk of the board of commissioners or before a justice of the peace of the county, take and subscribe an oath faithfully and honestly to account for the taxes with the sheriff or other person authorized to receive the same. Such oath shall be filed with the register of deeds and kept in the office of the board of commissioners, and for failure of any deputy sheriff to pay over such taxes as he may collect he shall be guilty of a misdemeanor. (Rev., s. 5241; 1917, c. 234, s. 88; 1919, c. 92, s. 88; C. S., s. 7995.)
- § 105-417. Compromise of tax claims due by railroad companies in which State owns majority of stock, authorized.—The Commissioner of Revenue of the State of North Carolina and the governing bodies of any county, municipality, or other taxing subdivision in this State, are hereby authorized within their discretion to accept in full settlement for all taxes which have heretofore become due settlements thereof which may be less than the full amount of such taxes, penalties and costs as to any taxes which may be due by any railroad company in North Carolina in which the State of North Carolina is the owner of more than a majority of the outstanding capital stock; and said settlement may be accepted by said officials if in their judgment the acceptance of the same will be for the best interests and to the advantage of the respective taxing units holding such tax claims. (1939, c. 76.)

Editor's Note. — For comment on this section, see 17 N. C. Law Rev. 379.

ARTICLE 33A.

Agreements with United States or Other States.

§ 105-417.1. Agreements to co-ordinate the administration and collection of taxes.—The Commissioner of Revenue is hereby authorized, with the approval of the Governor and Council of State, to enter into agreements with the United States government or any department or agency thereof, or with a state or any political subdivision thereof, for the purpose of co-ordinating the administration and collection of taxes imposed by this State and administered

and collected by said Commissioner with taxes imposed by the United States or by any other state or political subdivision thereof. (1943, c. 747, s. 1.)

Editor's Note.—For comment on this enactment, see 21 N. C. Law Rev. 363.

- § 105-417.2. Expenditures and commitments authorized to effectuate agreements.—The Commissioner of Revenue with the approval of the Governor and Council of State is authorized and empowered to undertake such commitments and make such expenditures, within the appropriations provided by law, as may be necessary to effectuate such agreements. (1943, c. 747, s. 2.)
- § 105-417.3. Returns to be filed and taxes paid pursuant to agreements.—Notwithstanding any other provision of law, returns shall be filed and taxes paid in accordance with the provisions of any agreement entered into pursuant to this article. (1943, c. 747, s. 3.)

ARTICLE 34.

Tax Sales.

Part 1. Sale of Realty.

- § 105-418. Sales for 1930 on dates other than first Monday in June validated.—All sales of land for failure to pay taxes, held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the year one thousand nine hundred thirty, on any day subsequent to or other than the first Monday in June of said year, are hereby, approved, confirmed, validated and declared to be proper, valid and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales are hereby approved and validated to all intents and purposes, and with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, one thousand nine hundred thirty. (1931, c. 160.)
- § 105-419. Tax sales for 1931-32 on day other than law provides and certificates validated.—All sales of land for failure to pay taxes, held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the year one thousand nine hundred thirty-one and one thousand nine hundred thirty-two, on any day subsequent to or other than the first Monday in June of said year, are hereby, approved, confirmed, validated and declared to be proper, valid and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales, be, and they are hereby, approved and validated to all intents and purposes, and with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, one thousand nine hundred thirty-one and one thousand nine hundred thirty-two. (1933, c. 177.)

Local Modification. — Durham, Mecklenburg: 1933, c. 177.

§ 105-420. Tax sales for 1933-34 and certificates validated.—All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the years one thousand nine hundred thirty-three and one thousand nine hundred thirty-four or on any date subsequent to or other than the date prescribed by law and all certificates of sale executed and issued pursuant to and in accordance with such sales be and the same are hereby approved, confirmed and validated and shall have the same force and legal effect as if said sales had been held and conducted on the date prescribed by law.

The board of county commissioners of any county or the governing board of

any city, town or other municipality may by resolution order the sheriff or tax collecting officer of the said county, city, town or other municipality to advertise in the manner provided by law and sell all land for the taxes of any year levied by the said county, city, town or other municipality, which land has not heretofore been legally sold for the failure to pay said taxes. The sale or sales herein authorized shall be held not later than the first Monday in September, one thousand nine hundred thirty-five, and certificates of sale shall be issued in accordance with and pursuant to said sale or sales in the same manner as if said sale or sales had been held and conducted as provided by law. Any sale held and conducted under the provisions of this paragraph and all certificates issued pursuant to such sales shall be and the same are hereby approved, confirmed and validated and shall have the same force and legal effect as if said sale had been held and conducted on the date prescribed by law.

All actions instituted in any county, city, town or other municipality for the foreclosure of certificates of sale issued for the taxes of the years one thousand nine hundred twenty-seven, one thousand nine hundred twenty-eight, one thousand nine hundred thirty-one thousand nine hundred thirty-one and one thousand nine hundred thirty-two subsequent to October first, one thousand nine hundred thirty-four, and all such actions instituted before October first, one thousand nine hundred thirty-five, shall be and the same are hereby approved, validated and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October first, one thousand nine hundred thirty-four: Provided, that this section shall not be construed to repeal any private or local act passed by the General

Assembly of one thousand nine hundred thirty-five. (1935, c. 331.)

§ 105-421. Notices of sale for taxes by publication validated.— All sales of real property under tax certificate foreclosures, made since January first, one thousand nine hundred twenty-seven, where the original notice of sale was published for four successive weeks, and any notice of resale was published for two successive weeks, preceding said sales, whether the notice of sale was required to be published in a newspaper or at courthouse door, or both, shall be, and the same are in all respects validated as to publication of said notice: Provided said publication was completed as above set out within ten days of the date of the sale.

The provisions of this section shall not apply to the counties of Alleghany, Beaufort, Cabarrus, Camden, Carteret, Caswell, Currituck, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Johnston, Jones, Macon, Mitchell, Moore, Nash, New Hanover, Perquimans, Pitt, Polk, Rowan, Rutherford, Scotland, Surry, Wake, Warren, Washington, and Wayne. (1937, c. 128.)

Part 2. Refund of Tax Sales Certificates.

§ 105-422. Tax liens barred.—No action shall be maintained by any county or municipality to enforce any remedy provided by law for the collection of taxes or the enforcement of any tax liens held by counties and municipalities, whether such taxes or tax liens are evidenced by the original tax books or tax sales certificates or otherwise, unless such action shall be instituted within ten years from the time such taxes became due: Provided, that as to tax foreclosure actions which under existing laws are not and will not be barred prior to December 31st, 1948, foreclosure actions may be instituted thereon at any time prior to December 31st, 1948: Provided, further, that this section shall not be construed as applying to the liens for street and/or sidewalk improvements; and provided further, that this section shall not be applicable to any pending tax foreclosure actions. Provided that the provisions of this section shall not apply to Ashe, Buncombe, Burke, Carteret, Camden, Clay, Columbus, Cumberland, Currituck, Dare, Davie, Edgecombe, Franklin, Gates, Greene, Harnett, Hoke, Hyde,

Iredell, Lee, Macon, Madison, Moore, Nash, Northampton, Orange, Pender, Pamlico, Perquimans, Richmond, Scotland, Rockingham, Vance, Warren, Wayne and Wilson counties or any of the political subdivisions thereof. (1933, c. 181, s. 7; c. 399; 1947, c. 1065, s. 1; 1949, cc. 60, 735.)

Cross References. — As to foreclosure of liens for unpaid assessments for local improvements, see § 160-93. See also note to § 105-414.

Editor's Note,-The 1947 amendment rewrote this section, which formerly barred only tax liens for 1926 and prior years upon which no foreclosure proceedings had been instituted. Section 2 of the amendatory act, in addition to repealing § 105-423, provided: "All public and public-local laws and clauses of laws in conflict with this act, or providing for different statute of limitations for tax foreclosure actions, are hereby repealed, the purpose hereof being to make this a State-wide act applicable to all the counties of the State; provided, that nothing herein shall bar or prevent the institution of suits to foreclose the lien of taxes for which certificates have been filed as judgments under the provisions of G. S. § 105-392, within the time and under the conditions set out in subsection (h) of said section."

The first 1949 amendment struck out "Yadkin" from the list of counties at the end of this section so as to make it applicable to Yadkin County, and the second 1949 amendment struck out "Rowan" from the list of counties.

For comment on the 1947 amendment, see 25 N. C. Law Rev. 461.

An action under § 105-414 to foreclose the lien for municipal taxes for the years 1925 and 1926 was barred by this section as it read prior to the 1947 amendment, since the legislative intent to bar the enforcement of all liens for unpaid taxes for the year 1926 and the years prior thereto, under whatever guise attempted, was apparent from the language used. Raleigh v. Jordan, 218 N. C. 55, 9 S. E. (2d) 507 (1940).

§ 105-423: Repealed by Session Laws 1947, c. 1065, s. 2.

§ 105-423.1. Tax liens, where foreclosure suit not instituted, barred in certain counties ten years after due date.—No action shall be maintained by any county or municipality to enforce any remedy provided by law for the collection of taxes or the enforcement of any tax liens held by counties and municipalities whether such taxes or tax liens are evidenced by original tax books or tax sales certificates unless such action shall be instituted, and a lis pendens shall have been filed in the office of the clerk of the superior court in the county where the tax was levied, within ten years from the time such taxes became due, or if payable in installments, ten years from the due date of each installment. This section shall apply only to the counties of Guilford, Mecklenburg, Durham, Jones and Onslow and municipalities therein; but this section shall apply to Harnett County from and after July 1, 1950. (1945, c. 832; 1949, c. 269.)

Editor's Note.—The act inserting this section, as amended by Session Laws 1947, c. 984, provides that it shall be in effect from October 1, 1946, except that as to Durham County it shall be in effect from October 1, 1949. Session Laws 1945, c.

1023, re-affirmed the effective date as to Mecklenburg County and municipalities therein.

The 1949 amendment made this section applicable to Harnett County.

ARTICLE 35.

Sheriff's Settlement of Taxes.

§ 105-424. Time and manner of settlement.—The sheriff or other accounting officer shall, on or before the second Monday of January in each year, settle his estate tax account with the commissioners of his county and pay the amount for which said sheriff or collector is liable to the Treasurer of the State, in such manner or at such place as he shall direct, on or before the third Monday of said month: Provided, the State Treasurer may extend the time on a sufficient amount to cover the State tax on the land sales in each county to the first Monday in May. The commissioners shall forthwith report to the State Auditor the amount due from such accounting officer, setting forth therein the

net amount due to each fund; and the Treasurer, upon a statement from the State Auditor, shall open an account against such officer and debit him accordingly, Upon the failure of the board of county commissioners to make this report to the State Auditor on or before the third Monday of January of each year, or if a report has been filed which is not correct and the commissioners fail to file an amended and corrected report within thirty days after being notified so to do by the State Auditor, the commissioners of such county shall each personally be liable to a penalty of one hundred dollars, and it shall be the duty of the State Auditor forthwith to institute an action in the county of Wake to enforce the same. The sheriff or tax collector, in making his settlements as aforesaid, shall file with the commissioners a duplicate of the list required in this chapter. In such settlement the sheriff or other officer shall be charged with the amount of public tax as the same appears by the abstract of the taxables transmitted to the State Auditor; also with all double taxes on unlisted property by him received, and with other tax which he may have collected or for which he is chargeable. The State Auditor shall give to each sheriff or tax collector a certified statement embracing the subjects of taxation contained in both lists and the amount of tax on each subject which the sheriff or tax collector shall deposit with the clerk of the commissioners of his county for public inspection. The sheriffs and tax collectors shall receive five per cent on all taxes collected by them for State, county, township, school district, or other purposes whatsoever, up to the sum of fifty thousand dollars, and upon all such sums so collected by him in excess thereof he shall receive two and one-half per cent commission, and the sheriffs or tax collectors shall receive for their own use, in addition to other fees or salary received by them, a commission of five per cent on all privilege and license taxes collected under schedule B of the Revenue Act, and any provision in any local act in conflict with this provision is hereby repealed. (Rev., s. 5245; 1917, c. 234, s. 101; 1919, c. 92, s. 101; C. S., s. 8042.)

Local Modification.—Buncombe: C. S., s. 8042; Perquimans: 1943, c. 745.

Cross References.—For other provisions relating to settlement, see § 105-390. As to sheriff's duty to settle school tax, see § 115-106 and note.

Settlement Has Attributes of Contract.—An account stated and settlement between a county and its tax collector have the force of a contract, and operate as a bar to a subsequent accounting, except upon a specific allegation of fraud or mistake. Settle v. Doggett, 87 N. C. 203 (1882).

Fees of Sheriff Regulated by Legislature.—The regulation of the sheriff's fees is within the control of the legislature and may be reduced during the term of the incumbent. Commissioners v. Stedman, 141 N. C. 448, 54 S. E. 269 (1906).

Basis of Compensation Changed—Right of Out-Going Sheriff.—A sheriff whose term of office expires is entitled to collect the taxes on the lists in his hands and to receive commissions therefor, notwith-

standing the office has been placed upon a salary basis for his successor. Commissioners v. Bain, 173 N. C. 377, 92 S. E. 176 (1917).

Same—Where Sheriff Re-elected.—Upon the re-election of the sheriff he receives only the salary fixed by the act of legislature changing the basis of compensation. Miller v. Deaton, 170 N. C. 386, 87 S. E. 123 (1915).

Drainage Assessments.—This section, allowing sheriffs a commission of 5 per cent on taxes collected, refers only to taxes collected for general governmental purposes, and not to assessments in drainage districts imposed for the special benefits to the lands therein. Commissioners v. Davis, 182 N. C. 140, 108 S. E. 506 (1921).

Action on Bond of Sheriff.—As to action under former statute, on bond of sheriff for failure to pay over taxes collected, see Commissioners v. Clarke, 73 N. C. 255 (1875).

SUBCHAPTER IV. LISTING OF AUTOMOBILES.

ARTICLE 35A.

Listing of Automobiles in Certain Counties.

- § 105-425. Listing by owner required.—Every owner of a motor vehicle in the counties specified herein shall list such motor vehicle for taxes in such counties at the same time residents of such counties are or may be required by law to list real and/or personal property for taxation. (1931, c. 392, s. 1.)
- § 105-426. Commissioner of Motor Vehicles to furnish list of registered automobiles to counties.—The Commissioner of Motor Vehicles shall furnish to the tax listing authorities of the counties enumerated in § 105-429, or to the tax collectors thereof, a list showing the names and addresses of all owners of motor vehicles in such counties as of January first in each year. The list shall also show the make, type and character of such motor vehicle and the date of registration thereof. This list shall be furnished as soon after the first day of January in each year as it can be prepared and furnished. The cost of preparing such lists shall be paid by the authorities of the enumerated counties to which the lists are furnished. (1931, c. 392, s. 2.)

Cross Reference.—For another provision
relating to duty of Commissioner of Motor

Vehicles to furnish lists of motor vehicles to county authorities, see § 105-315.

- § 105-427. Listing by county authorities where owners fail to list.—The tax listing authorities of the counties specified herein shall compare said list of motor vehicle owners with the tax lists of such counties and if it appears that any owner of a motor vehicle has failed to list any motor vehicle registered in his name, it shall be the duty of such tax listing authorities or of the tax collectors of such counties to list such motor vehicle for purposes of taxation, together with any other property of such person, and the tax collectors of such counties shall collect the taxes thereon in the same manner as other taxes of such counties. (1931, c. 392, s. 3.)
- § 105-428. Basis of tax valuation.—All motor vehicles shall be valued or appraised for purposes of taxation upon the rule or standard of valuation established by "The Automobile Blue Book," or any other standard of value which may be reasonable, equitable and just. (1931, c. 392, s. 4.)
- § 105-429. Counties to which article applicable.—This article shall apply to the following counties: Alamance, Buncombe, Cabarrus, Camden, Caswell, Chowan, Clay, Currituck, Cleveland, Columbus, Durham, Gates, Guilford, Halifax, Harnett, Henderson, Hertford, Johnston, Iredell, Lee, Nash, Moore, McDowell, Orange, Pasquotank, Perquimans, Pitt, Polk, Rowan, Rutherford, Swain, Wayne and Watauga. (1931, c. 392, s. 5; 1949, c. 64.)

Editor's Note.—The 1949 amendment inserted "Clay" in the list of counties.

SUBCHAPTER V. GASOLINE TAX.

ARTICLE 36.

Gasoline Tax.

- § 105-430. Definitions; "motor fuel," "distributor."—The following words, terms, and phrases hereinafter used for the purpose of this article are defined as follows:
- (a) "Motor fuel" shall mean (a) all products commonly or commercially known or sold as gasoline (including casinghead and absorption or natural gasoline) regardless of their classification or uses; and (b) any liquid prepared, advertised, offered for sale or sold for use as or commonly and commercially used

as a fuel in internal combustion engines, which when subjected to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (American Society for Testing Materials Designation D-86) shows not less than ten per centum (10%) distilled (recovered) below three hundred forty-seven degrees (347°) Fahrenheit (one hundred seventy-five degrees (175°) Centigrade) and not less than ninety-five per centum (95%) distilled (recovered) below four hundred sixty-four degrees (464°) Fahrenheit (two hundred forty degrees (240°) Centigrade); with the exception that the term "motor fuel" shall not include commercial solvents which distill, by American Society for Testing Materials Method D-86, not more than nine (9%) per centum at 176° F. and which have a distillation range of 125° F. or less, of liquefied gases which would not exist as liquids at a temperature of 60° Fahrenheit and a pressure of 14-7 pounds per square inch absolute.

(b) "Distributor" is any person, firm, association of persons, corporation, municipality, county, or other political subdivision or agency that has on hand or in his or its possession in this State, or that produces, refines, manufactures, or compounds such motor fuels in this State for sale, distribution, or use herein. (1927, c. 93, s. 1; 1931, c. 145, s. 24; 1941, c. 376, s. 1.)

Editor's Note.—Public Laws 1921, c. 2, ss. 32-38, as amended by Public Laws 1923, c. 263, s. 2, was codified as article 3A of chapter 55 of volume 3 of the Consolidated Statutes, containing §§ 2613(c)-2613(i). The said article was amended by Public Laws 1927, c. 93, and subsequent acts to read as it now appears in this article.

The 1931 amendment extended the definition of distributor to include "municipality, county, or other political subdivision or agency." See note to § 105-434.

The 1941 amendment changed subsection (a) of this section. For comment on amendment, see 19 N. C. Law Rev. 516.

- § 105-431. Purpose of article; double taxation not intended.—The purpose of this article is to provide for the payment and collection of a tax on the first sale of motor fuels when sold, or the use, when used, in this State; double taxation is not intended. Motor fuels manufactured, produced, or sold for exportation, and exported are not taxable and should not be included in the reports hereinafter required to be made by distributors. (1927, c. 93, s. 2; 1931, c. 145, s. 24.)
- § 105-432. Sales in tank car shipments.—In the administration of this article the first sale shall not be construed to embrace the sale in tank car shipments from port terminals to licensed distributors within the State, but the tax hereinafter levied on such motor fuel shall be levied against and paid by such licensed distributor. (1927, c. 93, s. 2½; 1931, c. 145, s. 24.)
- § 105-433. Application for license as distributor.—Any distributor engaged in business on April 1, 1931, shall, within thirty days thereafter, and any other distributor shall, prior to the commencement of doing business, file a duly acknowledged application for a license with the Commissioner of Revenue on a form prescribed and furnished by him setting forth the name under which such distributor transacts or intends to transact business within this State, the address of each place of business and a designation of the principal place of business. If such distributor is a firm or association, the application shall set forth the name and address of each person constituting the firm or association, and if a corporation, the names and addresses of the principal officers and such other information as the Commissioner of Revenue may require. Each distributor shall at the same time file a bond in such amount, not exceeding twenty thousand dollars (\$20,000) in such form and with such surety or sureties as may be required by the Commissioner of Revenue, conditioned upon the rendition of the reports and the payment of the tax hereinafter provided for. Upon approval of the application and bond, the Commissioner of Revenue shall issue to the distributor a nonassignable license with a duplicate copy for each place of

business of said distributor in this State, which shall be displayed in a conspicuous place at each such place of business and shall continue in force until surrendered or canceled. No distributor shall sell, offer for sale, or use any motor fuels within this State until such license has been issued. Any distributor failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars (\$100.00), nor more than five thousand dollars (\$5,000.00), or imprisoned for not more than twenty-four months, or both. (1927, c. 93, s. 3; 1931, c. 145, s. 24.)

§ 105-434. Gallon tax.—There is hereby levied and imposed a tax of seven cents per gallon on all motor fuels sold, distributed, or used within this State. The tax hereby imposed and levied shall be collected and paid by the distributor producing, refining, manufacturing, or compounding within this State, or holding in possession within this State motor fuels for the purpose of sale, distribution, or use within the State, and shall be paid by such distributor to the Commissioner of Revenue in the manner and at the times hereinafter specified. No county, city, or town, or political sub-division shall levy or collect any tax upon the sale or distribution of motor fuels herein defined. For the purpose of determining the amount of the tax, it shall be the duty of every distributor to transmit to the Commissioner of Revenue not later than the twentieth day of each month, upon forms prescribed and furnished by such Commissioner, a report under oath or affirmation showing the quantity of motor fuel sold, distributed, or used by such distributor within this State during the preceding calendar month, and such other information as the said Commissioner may require: Provided, that any distributor may, if he elects to do so, use as the measure of the tax levied and assessed against him by this section the gross quantity of motor fuel purchased, produced, refined, manufactured, and/or compounded by such distributor, plus the amount of motor fuel on hand at the beginning of the period when such method of computation is used, less a tare of two per cent (2%) on gross monthly receipts of motor fuels not exceeding 150,000 gallons, and less a tare of one and one-half per cent (11/2%) on gross monthly receipts of such fuel in excess of 150,000 gallons and not exceeding 250,000 gallons, and less a tare of one per cent (1%) on gross monthly receipts of such fuels in excess of 250,000 gallons. Provided, that if any licensed distributor who has elected to pay the tax levied herein on the amount of motor fuel purchased, produced, refined, manufactured, or compounded, in lieu of the amount sold, distributed, or used, shall lose any such fuel by reason of fire, lightning, flood, windstorm, wrecking of transportation conveyance, acts of war, or any accidental or providential cause, and such loss is clearly proved to the satisfaction of the Commissioner of Revenue, the amount of motor fuel lost shall be excluded from the measure of his tax. Provided, further, that the Commissioner of Revenue shall have power under such rules and regulations as he may adopt for the purpose to refund to any nonlicensed distributor the tax on any motor fuel purchased by and delivered to him tax paid that is lost by fire, lightning, flood, windstorm, acts of war, or any accidental or providential cause, after it is delivered to him and before it is sold, but such loss must be clearly proved to the satisfaction of the Commissioner. (1927, c. 93, s. 4; 1929, c. 40, s. 1; 1931, c. 145, s. 24; 1941, cc. 16, 146; 1943, c. 113; 1949, c. 1250, s. 13.)

Editor's Note.—The first 1941 amendment added the two provisos at the end of this section. Prior to the second 1941 amendment this section provided for a tare of one per cent.

Prior to the 1943 amendment the last two provisos related only to losses by lightning, flood or windstorm.

The 1949 amendment, which also made

changes in §§ 105-435 and 105-449, increased the tax from six to seven cents per gallon, the additional tax becoming effective January 1, 1950. The amendatory act provides: "The additional one cent (1c) per gallon tax provided for in this section shall be applied exclusively to the payment of the principal of and the interest on the two hundred million dollars State of North

Carolina Secondary Road Bonds and as herein further provided in sec. 16 of this act."

Excise and Not Property Tax. — The State gasoline tax is an excise and not a property tax. Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813 (1933).

Tax May Be Levied on Political Subdivision.—Under the provisions of our Constitution, Art. V, sec. 5, the General Assembly is prohibited from levying a property tax on property owned by municipal corporations, but the prohibition does not extend to excise taxes, and under the provisions of this section, a municipality is liable for the gasoline tax on gasoline bought by it in bulk and distributed by it to its various departments for use in its govern-

mental functions. Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813 (1933).

Prior to the 1931 amendment the statute did not expressly include a municipality or political subdivision of the State within the definition of distributor, as it does now. See § 105-430. Consequently, in O'Berry v. Mecklenburg County, 198 N. C. 357, 151 S. E. 880 (1930), it was held that a county was not a distributor and was not liable for the tax on motor fuel used by such county in the discharge of its governmental functions. Perhaps, as a result of that decision, the General Assembly in 1931 expressly included a municipality and county within the definition of a distributor. Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813 (1933).

§ 105-435. Tax on fuels not included in definition; permits to operate vehicles; reports by holders of permits.—(a) Every person who owns or operates over the highways of this State, any motor vehicle propelled by a motor which uses any product not included within the definition of "motor fuels" hereinbefore set out to generate power for the propulsion of said vehicle, shall pay to the Commissioner of Revenue, for the use of the highways of this State, a tax of seven cents (7c) per gallon on the fuel used in such vehicle upon the highways of this State.

(b) The owner or operator of such a vehicle on July 1, 1941, or any person who purchases such a vehicle subsequent thereto, shall, before it is operated on the highways of this State, apply to the Commissioner of Revenue, on forms prescribed by him, for a permit to operate such vehicle on the highways of the State and shall make the tax payments herein levied direct to the Department of Revenue. Upon receipt and approval of such application the Commissioner of Revenue shall issue to such owner or operator a nonassignable permit which shall remain in effect until new license plates are required to be purchased and at that time shall be surrendered and a new permit showing the correct license number shall be issued. This permit shall at all times be in the possession of the operator of such vehicle and subject to inspection by any agent of the Department of Revenue or any dealer from whom such operator desires to purchase fuel. The holder of a permit issued under the provisions of this section shall be subject to the same laws and to the rules and regulations of the Commissioner of Revenue in regard to the payments of tax and filing reports that licensed distributors of motor fuel are subject to, and such person shall also be subject to any other rules and regulations promulgated by the Commissioner of Revenue for the proper administration of this section: Provided, however, no bond shall be required. Provided, further, any person duly licensed as a motor fuel distributor under the provisions of this article who owns and operates motor vehicles for his own use and utilizes in such vehicles fuel not defined as motor fuel in this article, is authorized to pay the tax levied in this section on such fuel at the same time and in the same manner as is provided for motor fuel distributors, and such tax shall be subject to the tares allowed by law to motor fuel distributors. In the event that a person elects to qualify as a motor fuel distributor and pay the tax as authorized by this proviso, it shall not be necessary for such person to secure the permit or make the reports required by this section, but such person shall comply with all the laws relating to motor fuel distributors.

(c) For the purpose of determining the amount of tax due, the owner or operator of every motor vehicle holding a permit issued under the provisions of this section shall file a report on or before the twentieth day of each month showing the number of miles each vehicle was operated over the highways of the State, the

amount of fuel used during the preceding month and such other information as the Commissioner of Revenue may require. At the time of filing his report, said person shall pay to the Commissioner of Revenue the tax levied in paragraph (a) of this section.

(d) It shall be unlawful for any distributor, dealer or other person knowingly to sell fuel for use in such vehicles to owners or operators who do not hold permits as required by this section without collecting the tax herein levied and remitting the same to the Commissioner of Revenue as required on sales of motor fuel. It shall also be unlawful for any person who does not hold a permit, as provided herein, to operate such vehicles over the highways of the State on fuel on which the tax is not paid as provided herein.

If the owner or operator of any such vehicle shall fail to secure a permit, file a report or pay the tax as herein provided, his motor vehicle license shall be cancelled. It shall be the duty of the Commissioner of Revenue, upon such failure, to certify the same to the Department of Motor Vehicles or such agency of the State as has charge of issuing motor vehicle licenses and upon receipt of such certification the Department of Motor Vehicles or such other agency of the State as has charge of issuing motor vehicle licenses shall immediately have the license of the vehicle or vehicles returned for cancellation.

(e) Any person violating any of the provisions of this section shall be required to pay to the Commissioner of Revenue all taxes found to be due and, in addition thereto, a penalty of twenty-five per centum (25%) thereof, and such person shall also be guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned in the discretion of the court. (1941, c. 376, s. 2; 1949, c. 1250, s. 13.)

creased the tax in subsection (a) from six to seven cents per gallon, the additional tax

Editor's Note.—The 1949 amendment in- becoming effective January 1, 1950. As to application of additional tax, see note to § 105-434.

- § 105-436. Payment of tax.—Every distributor, at the time of making the report required by § 105-434, shall pay to the Commissioner of Revenue, the amount of tax due for the month covered by such report. The tax so paid shall be transferred promptly by the said Commissioner to the State Treasurer as other receipts of his office and the State Treasurer shall place the same to the credit of the "State Highway Fund." (1927, c. 93, s. 5; 1931, c. 145, s. 24.)
- § 105-437. Action by Commissioner of Revenue if distributor fail to report.—If any distributor shall willfully fail, neglect or refuse to make the reports required by § 105-434 within the time therein provided, the Commissioner of Revenue shall immediately inform himself as best he may as to all matters and things required to be set forth in such reports, and from such information as he may be able to obtain, determine and fix the amount of the tax due the State from such delinquent distributor for the period covering the delinquency, adding to the tax so determined and as a part thereof, an amount equal to twenty-five per cent (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per cent and transmit the same in the manner provided in § 105-436 for the disposition of other taxes. (1927, c. 93, s. 6; 1931, c. 145, s. 24.)
- 105-438. Record of transactions. Every distributor of motor fuels shall keep a record of all such fuels purchased, received, sold, delivered or used by him, which shall include the number of gallons so purchased, received, sold, delivered, or used, and the dates of such purchases and sales, which records shall be preserved for a period of two years and shall at all times during the business hours of the day be subject to inspection by the Commissioner of Revenue or his deputies, or such other officers as may be duly authorized by said Commissioner. (1927, c. 93, s. 8; 1931, c. 145, s. 24.)
- § 105-439. Rebates for fuels sold to U.S. government or for use in aircraft.—The Commissioner of Revenue is authorized under such rules and

regulations as he may adopt for that purpose, to relieve any distributor from the payment of the tax herein levied for any motor fuels sold to the United States government, and/or gasoline of such quality that it is not adapted for use in ordinary automotive vehicles, but is designed for and sold and used exclusively in aircraft motors, when it appears to the satisfaction of the Commissioner of Revenue that the tax herein imposed has not been added to the sale price of such motor fuel, and the Commissioner of Revenue is likewise authorized to refund by warrant drawn upon the State Treasurer to the person paying the same, any tax paid under the provisions of this article which constitutes an unlawful burden upon interstate commerce, in conflict with the provisions of the Constitution of the United States: Provided, that any claims for such rebate, which are not filed with the Commissioner of Revenue in accordance with forms to be provided by the Commissioner of Revenue within sixty days after the payment of said tax, shall be deemed to have been waived. (1931, c. 145, s. 24.)

- § 105-440. Penalty for making false claim for rebate.—Any person who shall willfully make any false or fraudulent report as the basis for claim for rebate or deduction under the provisions of this article, shall be guilty of a misdemeanor, and upon conviction shall be fined and imprisoned in the discretion of the court. (1927, c. 93, s. 10; 1931, c. 145, s. 24.)
- § 105-441. Enumeration of acts constituting misdemeanor; cancellation of license and bond .- Any distributor who shall fail, neglect, or refuse to make the reports herein required or pay the taxes herein imposed, or who shall refuse to permit the Commissioner of Revenue or any agent appointed by him, to examine the books and records of such distributor pertaining to the motor fuels made taxable by this article or who shall make any false, or fraudulent report or statement hereunder, or who does, or attempts to do, any thing whatsoever to avoid a full disclosure of the quantity of motor fuels sold, distributed or used within this State shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars (\$100.00) and not more than five thousand dollars (\$5,000.00) or, in the case of an individual or the officer or employee charged with the duty of making such report for a corporation, to be imprisoned not exceeding twenty-four months, or both; and the Commissioner of Revenue may forthwith cancel the license of such distributor and notify him in writing of such cancellation by registered mail to be sent to his last known address. In the event that the license of any distributor is cancelled as above provided, and in the event such distributor shall have paid to the State of North Carolina all the taxes due and payable by him under this article, together with any and all penalties accruing under the provisions of this article, then the Commissioner of Revenue shall cancel and surrender the bond theretofore filed by said distributor. (1927, c. 93, s. 11; 1931, c. 145, s. 24; 1933, c. 544, s. 10.)
- § 105-442. Actions for tax; double liability.—If any person, firm or corporation shall fail to pay the amount of tax levied in § 105-434 within the time specified in § 105-436 it shall be the duty of the Commissioner of Revenue to proceed at once to enforce the payment of said tax, and to this end the Commissioner of Revenue shall have and may exercise all the remedies provided in the revenue laws of the State for enforcing payment of other taxes, including the right of execution through the sheriffs of the several counties of the State upon any property of the delinquent taxpayer, and shall, with the assistance of the Attorney General whenever necessary, bring appropriate action in the courts of the State for the recovery of such tax. If it shall be found as a fact that such failure to pay was willful on the part of such person, firm or corporation, judgment shall be rendered against such person, firm or corporation for double the amount of tax found to be due, together with interest, and the amount of taxes and penalties shall be paid into the State treasury to the credit of the State Highway Fund. All remedies which now or may hereafter be given by the laws of the State of North Carolina

for the collection of taxes are expressly given herein for the collection of taxes levied in this article or of judgment recovered under authority of this article. It shall also be the duty of the Commissioner of Revenue to revoke the license of any licensed distributor who shall refuse, fail or neglect to pay the taxes levied in § 105-434 within the time specified in § 105-436, and whose account shall remain delinquent for any part of said tax for ten days thereafter. (1927, c. 93, s. 12; 1931, c. 145, s. 24; 1933, c. 137, s. 1.)

Editor's Note.—The 1933 amendment re-

- § 105-443. Auditing books of licensed distributors.—It shall be the duty of the Commissioner of Revenue, by competent auditors, to have the books and records of every licensed distributor in the State examined at least twice each year to determine if such distributor is keeping complete records as provided in § 105-438, and to determine if correct reports have been made to the State Department of Revenue by every such distributor covering the total amount of tax liability of such licensed distributor. It shall also be the duty of such auditors to check the records of each distributor with the records of shipment by railroad companies, or by boats or trucks, or other available sources of information, and also to check the records covering the receipt and distribution of any other liquid petroleum products handled by each distributor. (1933, c. 137, s. 1.)
- § 105-444. License constitutes distributor trust officer of State for collection of tax.—The licensing of any person, firm or corporation as a whole-sale distributor of gasoline shall constitute such distributor an agent or trust officer of the State for the purpose of collecting the tax on the sale of gasoline imposed in this article. When any such person, firm or corporation, who adds the amount of the tax levied in this article to the customary market price for gasoline and collects the same, shall fail to remit the gasoline tax to the Commissioner of Revenue upon the terms and as provided herein, such failure shall constitute embezzlement of State funds, and upon conviction under this section any individual, partner or officer or agent of any association, partnership or corporation shall be guilty of a felony, and upon conviction shall be fined or imprisoned in the discretion of the court. (1933, c. 137, s. 1.)
- § 105-445. Application of proceeds of gasoline tax.—The fund derived from the tax herein levied shall be for the exclusive uses of the purposes set out in this article, and disbursed on vouchers drawn by the State Highway and Public Works Commission in accordance with the acts of the General Assembly dealing with the subject matter herein referred to. (1931, c. 145, s. 24; 1933, c. 172, s. 17.)
- § 105-446. Tax rebate on fuels not used in motor vehicles on highways.—Any person, association, firm, or corporation, who shall buy in quantities of ten gallons or more at any one time any motor fuels as defined in this article for the purpose of use, and the same is actually used, for a purpose other than the operation of a motor vehicle designed for use upon the highways, on which motor fuels the tax imposed by this article shall have been paid, shall be reimbursed at the rate of five cents per gallon of the amount of such tax or taxes paid under this article: Provided, however, that motor vehicles designed for use but not used upon the highways of this State shall be entitled to the refund of gasoline tax as herein provided, upon the following conditions and in the following manner:

(a) Before using such motor fuels the person, association, firm, or corporation proposing to use the same shall apply to the Commissioner of Revenue, upon blanks to be furnished by him, for a refund permit. Such application shall state the use for which the motor fuels for which taxes are to be refunded are to be used. If such motor fuels are to be used in a gasoline motor or engine, the application shall state the make and kind of such motor, the serial number thereof, and the purpose for which it is proposed to use the same. If such motor fuels are to

be used for some purpose other than the operation of an engine, the application shall state the nature and kind of process in which such motor fuels are to be used, and the method and manner in which such motor fuels are to be used, stored and kept. In all case such application shall state the approximate number of gallons of such motor fuels to be used per month, and shall give such other information as the Commissioner of Revenue shall require. In making application for refund permit, the person making application may combine one or more of the uses above specified in the same application. Dealers in motor fuel engaged in selling such fuel to motor boats owned by nonresidents, and which boats are not documented in this State, may apply to the Commissioner of Revenue for a permit on forms to be prescribed by the Commissioner of Revenue, which permit shall entitle the said dealer to be furnished with blanks by the Commissioner of Revenue in such form as may be prescribed by him, for the use of such nonresident boat owners to file applications for refunds as provided in this article, and said nonresident boat owners shall not be required to secure permits. Such application for refund shall be filed in the name of the nonresident boat owner on blanks furnished by dealers holding permits. Said applications must be accompanied by an invoice of the dealer holding permit, showing the number of gallons of motor fuel delivered into the tanks of said boats and shall furnish such other information as the Commissioner of Revenue shall require. Applications must be sworn to before a notary public of this State and filed with the Commissioner of Revenue. Upon approval of said applications by the Commissioner of Revenue, said applications shall be paid as other applications for refund are paid: Provided, however, that such nonresidents must file applications with the Commissioner of Revenue within thirty days from the date of purchase of said gasoline and that said applications may be paid immediately upon approval. 'The application shall be accompanied by a fee of one dollar, to be returned if the refund permit is not issued. Such fees, if retained, shall be paid by the Commissioner of Revenue to the State Treasurer, to be credited by him to the State Highway Fund.

(b) If, upon the filing of such application, the Commissioner of Revenue shall be satisfied that the same is made in good faith and that the motor fuels upon which the said tax refund is requested are to be used exclusively for one of the purposes set forth above and specified in said application, he shall issue to said applicant a refund permit specifying the terms and conditions under which refunds on such motor fuels will be made, which refund permits will expire with the fiscal year in which it is issued. Refund permits issued under this article shall state the name of the person, association, firm, or corporation to whom and for whose benefit it is issued, the purposes for which the motor fuels upon which tax refunds are to be made under the provisions thereof are to be used and the approximate number of gallons expected to be used per month for such purposes, and the Commissioner of Revenue shall determine such amount. Such refund permits shall bear serial numbers and shall not be transferable, nor shall any right or claim for refund under the same be transferable: Provided, however, that the Commissioner of Revenue shall not be required to issue any refund permit for use of motor fuels unless and until the applicant therefor shall have satisfied the Commissioner of Revenue that provisions have been made for the storage of such motor fuels in a manner prescribed by the Commissioner of Revenue, so as to segregate the same from motor fuels for use in vehicles upon the highways.

(c) All claims for refunds for tax or taxes for motor fuels under the provisions of this article shall be filed with the Commissioner of Revenue on forms to be prescribed by him, between the first and the fifteenth day of January. April, July, and/or October of each year, and at such periods only, and shall cover only the motor fuels so used during the three months immediately preceding the filing of such application. Such application shall be accompanied by ticket, invoice, or other document from the retail dealer or distributor for motor fuels, issued at the time of purchase of such motor fuel and showing the purchase of the number of gallons of motor fuels on which said refund is requested, and upon which shall

be written or stamped at the time of purchase appropriate words showing the purpose for which the said motor fuel is purchased and that refund will be requested. The application shall be sworn to before the clerk of the superior court or a notary public of the county in which the applicant resides or has his place of business, and such attesting officer is authorized to charge therefor a fee of not exceeding twenty-five cents. Provided, that claims for refund of the tax on motor fuel that are not filed with the Commissioner of Revenue within the time specified in this section, but that are filed within 30 days thereafter, may be paid by the Commissioner of Revenue after first deducting 10% from said claims as a penalty for not filing them within the time specified. Provided that the invoices or delivery tickets issued by the retail dealer or distributor and filed as a part of any claim for a refund of tax on motor fuel, shall be marked paid by the dealer or distributor and shall show the date of purchase and the date of payment.

(d) If the Commissioner of Revenue shall be satisfied that the motor fuels specified in such application for refund have been legitimately used for the purpose specified in the refund permit issued to such applicant, he shall issue to such applicant a warrant upon the State Treasurer for the said taxes paid on such mo-

tor fuels under this article.

(e) No refund of tax or taxes shall be paid on motor fuels except under a refund permit and to the person, association, firm, or corporation named in said re-

fund permit in the manner herein provided for.

(f) If the Commissioner of Revenue shall be satisfied that the holder of any refund permit issued under the provisions of this article has violated the conditions thereof, or has collected or sought to collect any refund of tax or taxes thereunder upon any motor fuels not used in strict accordance with said refund permit, he shall issue notice to the holder of such refund permit to show cause why the refund permit should not be cancelled, which notice shall state a time and place of hearing upon said notice. If upon such hearing the Commissioner shall find as a fact that the permit holder has violated the terms of his permit, he shall cancel such refund permit and the holder thereof shall be required to repay all tax or taxes which have been refunded to him under such permit.

(g) Any applicant for a refund permit or any holder of a refund permit may appeal from the decision of the Commissioner of Revenue upon any matters arising under this section to the State Board of Assessment, who shall hear the matters presented on such appeal at a time and place to be fixed by said State Board of Assessment. Such State Board of Assessment shall have authority to cause the attendance of witnesses in behalf of such applicant or of the Commissioner of

Revenue, and shall have authority to administer oaths and take testimony.

(h) The Commissioner of Revenue is hereby authorized and directed, if at any time in his opinion there is reason to doubt the accuracy of the facts set forth in any application for tax refund, to refer the matter to any agent of the Department of Revenue or to any member of the State Highway Patrol, and such person so designated shall make a careful investigation of all the facts and circumstances relating to said application in the use of the motor fuel therein referred to, and shall have a right to have access to the books and records of any retailer or distributor of motor fuel products for the purpose of obtaining the necessary information concerning such matters, and shall make due report thereof to the Commissioner of Revenue.

(i) If any court of last resort shall hold that the provisions for refund herein set out shall render the levying and collecting of the tax hereinbefore provided invalid, it is the intention of the General Assembly that such provisions for refund shall be annulled and the tax shall be levied without any provisions for such refund and that this article shall be so construed.

Any person making a false return or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding five hundred dollars (\$500.00), or imprisoned not exceeding two years, in the discre-

tion of the court. (1931, c. 145, s. 24; c. 304; 1933, c. 211; 1937, c. 111; 1941, c. 15; 1943, c. 123.)

Editor's Note. — The 1941 amendment, which added the first proviso to subsection (c), took no notice of the 1933 amendment which changed the wording of the subsec-

tion.

The 1943 amendment added the second proviso to subsection (c).

105-447. Reports of carriers.—Every person, firm or corporation engaged in the business of, or transporting motor fuel, whether common carrier or otherwise, and whether by rail, water, pipeline or over public highways, either in interstate or in intrastate commerce, to points within the State of North Carolina. and every person, firm or corporation transporting motor fuel by whatever manner to a point in the State of North Carolina from any point outside of said State shall be required to keep for a period of two years from the date of each delivery records on forms prescribed by, or satisfactory to, the Commissioner of Revenue of all receipts and deliveries of motor fuel so received or delivered to points within the State of North Carolina, including duplicate original copies of delivery tickets or invoices covering such receipts and deliveries, showing the date of the receipt or delivery, the name and address of the party to whom each delivery is made, and the amount of each delivery; and shall report, under oath, to the Commissioner of Revenue, on forms prescribed by said Commissioner of Revenue, all deliveries of motor fuel so made to points within the State of North Carolina. Such reports shall cover monthly periods, shall be submitted within the first ten days of each month covering all shipments transported and delivered for the previous month, shall show the name and address of the person to whom the deliveries of motor fuel have actually and in fact been made, the name and address of the originally named consignee if motor fuel has been delivered to any other than the originally named consignee, the point of origin, the point of delivery, the date of delivery, and the number and initials of each tank car, and the number of gallons contained therein if shipped by rail; the name of the boat, barge or vessel, and the number of gallons contained therein, and the consignor and consignee if shipped by water; the license number of each tank truck and the number of gallons contained therein, and the consignor and consignee if transported by motor truck; if delivered by other means the manner in which such delivery is made; and such other additional information relative to shipments of motor fuel as the Commissioner of Revenue may require: Provided that the Commissioner of Revenue may modify or suspend the provisions of this section with regard to reports of interstate or intrastate shipments or deliveries upon application of any licensed distributor: Provided, also, that the Commissioner of Revenue shall have full power to require any distributor to make additional reports and to produce for examination duplicate originals of delivery tickets or invoices covering both receipts and deliveries of products as herein provided. The reports herein provided for shall cover specifically gasoline, kerosene, benzine, naphtha, crude oil, or any distillates from crude petroleum. Any person, firm or corporation refusing, failing or neglecting to make such report shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1929, c. 230; 1933, c. 137, s. 1.)

Editor's Note. — The 1933 amendment struck out this section as it formerly read and substituted the above in lieu thereof.

§ 105-448. Forwarding of information to other states. — The Commissioner of Revenue of the State of North Carolina shall, upon request duly received from the officials to whom are intrusted the enforcement of the motor fuel tax laws of any other state, forward to such officials any information which he may have in his possession relative to the manufacture, receipt, sale, use, transportation or shipment by any person of motor fuel. (1933, c. 137, s. 1.)

§ 105-449. Exemption of gasoline used in public school transporta-

tion; false returns, etc.—1. Any person, firm or corporation holding a North Carolina State contract for the sale of gasoline to be used in public school transportation in North Carolina shall invoice gasoline so sold and delivered to the county boards of education at the prevailing contract price, less the State tax on gasoline. A copy of such invoice showing the board of education to whom the gasoline is delivered, the kind of gasoline sold, the gallons sold, and the contract price per gallon, shall be submitted to the North Carolina Department of Revenue each month, supported with an official purchase order from the county board or boards of education, which invoice or invoices and supporting purchase order shall exempt the gasoline purchased by said board or boards of education for use in North Carolina public school transportation from the seven cents tax per gallon State gasoline tax.

2. The Commissioner of Revenue of North Carolina is hereby authorized and directed to accept such invoices and supporting purchase orders, duly notarized, in lieu of the seven cents per gallon tax imposed by the laws of North Carolina upon said gasoline: Provided, when any authorized dealer has already paid the State gasoline gallon tax and furnishes the Commissioner of Revenue with proper invoices and supporting purchase orders as required in subsection 1 of this section, then such dealer shall be entitled to a refund by the Commissioner of Revenue or seven cents per gallon from the gasoline fund for each gallon so sold and delivered to the county boards of education for use in public school transportation in school busses, service trucks, and gasoline delivery wagons used only for school

purposes

3. It is the intent and purpose of this section to relieve gasoline used in the public school system of North Carolina from the seven cents gasoline tax now imposed by the State and thereby to that extent reduce the cost of public school

transportation.

4. Any person making a false return or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding five hundred dollars (\$500.00), or imprisoned not exceeding two years, in the discretion of the court. (1941, c. 119; 1949, c. 1250, s. 13.)

Editor's Note.—The 1949 amendment in subsections 1, 2 and 3. See note to § substituted "seven cents" for "six cents" 105-434.

SUBCHAPTER VI. TAX RESEARCH.

ARTICLE 37.

Department of Tax Research.

§ 105-450. Provision for Department of Tax Research.—The Governor may, in his discretion, separate the statistical and research unit of the Department of Revenue and designate it as a Department of Tax Research. (1941, c. 327, s. 1.)

Cross Reference.—As to Director of Department of Tax Research being member of State Board of Assessment, see § 105
Editor's Note.—For comment on this article, see 19 N. C. Law Rev. 445.

- § 105-451. Appointment of Director; salary. When so designated the Department shall be directed by an officer to be designated as the Director of the Department of Tax Research, who shall be appointed by and responsible to the Governor, and shall serve at the will of the Governor. The Director shall be paid an annual salary to be fixed by the Governor with the approval of the Advisory Budget Commission, payable in monthly installments, and shall likewise be allowed his traveling expenses when away from Raleigh on official business. (1941, c. 327, s. 2.)
- § 105-452. Clerical assistants and office equipment. The Director is authorized to employ such additional clerical assistants and to obtain such ad-

ditional office equipment as may be approved by the Governor and the Advisory Budget Commission. (1941, c. 327, s. 3.)

§ 105-453. Study of taxation; data for Governor and General Assembly; examination of persons, papers, etc.—It shall be the duty of the Director to make a statistical analysis by groups and by counties of receipts under each article of the Revenue Act, and to make a thorough study of the subject of taxation as it relates to taxation within and by the State of North Carolina, including cities, counties, and subdivisions, their exercise and power of taxation; and to make a study of the taxation in other states, including the subjects of listing property for taxation, the classification of property for taxation, exemptions, and tax collections and tax collecting, and he shall have the power and authority to make a comparative study of the subject of taxation in all its phases, including the relation between State taxation and federal taxation, and said Director shall assemble, classify and digest for practical use all available data on the subject of taxation, to the end that the same may be submitted to the Governor and General Assembly and may also be available for all citizens and officials of the State who are interested therein.

To carry out the purposes of this article, the Director of the Department of Tax Research shall have the same authority as given the State Board of Assessment in § 105-276, to examine persons, papers and records and to acquire reports from State Departments and counties, cities and towns. (1941, c. 327, s. 4.)

- § 105-454. Purpose of creation of Department.—The creation of the Department of Tax Research is for the purpose of securing for the public and the General Assembly, as well as for the Executive Department of the State, at a minimum cost, all such information that the public and the General Assembly and the Executive Department should have relative to tax matters, including methods and systems of taxation in other states, to the end that the Executive Department and the General Assembly in dealing with matters of revenue and taxation may have such information and tax data available for consideration. (1941, c. 327, s. 5.)
- § 105-455. Submission of proposed amendments to Budget Advisory Commission.—The Director of the Department of Tax Research shall prepare and submit to the Budget Advisory Commission such amendments to the Revenue and Machinery Acts as the survey made by the Director indicates should be made, for their consideration in preparing amendatory Revenue and Machinery Acts for the General Assembly. (1941, c. 327, s. 7.)
- § 105-456. Publication of biennial report.—The Director of the Department of Tax Research shall make and publish two thousand (2,000) copies of a biennial report, combined with the biennial report of the State Board of Assessment, of such scope as may be approved by the Governor, which shall include recommendations and a digest of the most important factual statistics of State and local taxation. (1941, c. 327, s. 8.)
- § 105-457. Expenses of Department of Tax Research.—All expenses of the Department of Tax Research, except the appropriation for the statistical and research unit and such allotments as may be made by the Governor from the contingency and emergency fund, shall be borne by the State Department of Revenue and all accounts kept by, and vouchers issued by, the accounting division of the Department of Revenue. (1941, c. 327, s. 9.)

SUBCHAPTER VII. PAYMENTS RECEIVED FROM TENNESSEE VALLEY AUTHORITY IN LIEU OF TAXES.

ARTICLE 38

Equitable Distribution between State and Local Governments.

- § 105-458. Apportionment of payments in lieu of taxes between State and local units.—The payments received by the State and local governments from the Tennessee Valley Authority in lieu of taxes under section thirteen of the Act of Congress creating it, and as amended, shall be apportioned between the State and the local governments in which the property is owned or an operation is carried on, on the basis of the percentage of loss of taxes to each, determined as hereinafter provided: Provided, however, that the minimum annual payment to any local government from said fund, including the amounts paid direct to said local government by the Authority, shall not be less than the amount of annual actual tax loss to such local government based upon the two year average on said property next prior to its being taken over by the Authority. (1941, c. 85, s. 1.)
- 105-459. Determination of amount of taxes lost by virtue of T. V. A. operation of property; proration of funds. — The State Board of Assessment shall determine each year, on the basis of current tax laws, the total taxes that would be due to both the State of North Carolina and the local governments in the same manner as if the property owned and/or operated by the Authority were owned and/or operated by a privately owned public utility: Provided, however, in making said calculations the State Board of Assessment shall use the tax rate fixed by the local government unit and taxing district involved for the tax year next preceding such calculations. The State Board of Assessment and the Treasurer of the State of North Carolina shall then prorate the funds received from the Authority by the State and local governments between the State and local governments upon the basis of the foregoing calculations. (1941, c. 85, s. 2.)
- 105-460. Distribution of funds by State Treasurer.—The Treasurer of the State of North Carolina shall then ascertain the payments to be made to the State and local governments upon the basis of the provisions of § 105-459 and he is authorized and directed to distribute the same between the State and local governments in accordance with the foregoing provisions of § 105-459. The Treasurer of the State of North Carolina is further authorized and directed to pay said sums to the State and local governments each month or so often as he shall receive payments from the Authority, but not more often than once each month, after first deducting from any sum to be paid a local government such amount as has theretofore been paid direct to said local government by the Authority for the same period: Provided, however, that the minimum annual payment to any local government from said fund shall not be less than the average annual tax on the property taken by the Authority for the two years next preceding the taking. (1941, c. 85, s. 3.)
- § 105-461. Duty of county accountant, etc.—The county accountant or other proper officer of each local government to which this subchapter is applicable shall:

(a) Certify to the State Board of Assessment and the Treasurer of the State of North Carolina the tax rate fixed by the governing body of such local govern-

ment immediately upon the fixing of the same;

(b) Certify each month to the Treasurer of the State of North Carolina a statement of the amount received by the local government direct from the Au-

No local government shall be entitled to receive its distributive share of said fund from the Treasurer of the State of North Carolina until the foregoing in§ 105-462

formation has been properly furnished. If any such local government shall fail to furnish the information herein required within ten days from and after receipt by it from the State Board of Assessment of request for the same, forwarded by registered mail, then and in that event it shall be barred from participating in the benefits provided for the period for which the same is requested. (1941, c. 85, s. 4.)

§ 105-462. Local units entitled to benefits; prerequisite for payments.—Any local governments within the State in which the Authority now or may hereafter own property or carry on an operation shall be entitled to the benefits arising under this subchapter: Provided, however, that no payment shall be made to them by the Treasurer of the State of North Carolina until such time as such local governments shall have certified to the State Board of Assessment and the Treasurer of the State of North Carolina the average annual tax loss it has sustained by the taking of said property for the two years immediately preceding the taking thereof: Provided, further, that in the event of any disagreement between said local governments and the Treasurer of the State of North Carolina as to such annual tax loss, then the same shall be determined by the State Board of Assessment, and its decision thereon shall be final. (1941, c. 85, s. 5.)

STATE OF NORTH CAROLINA

Department of Justice Raleigh, North Carolina November 30, 1950

I, Harry McMullan, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

HARRY McMullan,
Attorney General of North Carolina





General Statutes of N. C. Vol. 20 DATE DUE BORROWER'S NAME ROOM Gene 685

